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# Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims against Congress

Peter M. Shane

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# Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress\*

Peter M. Shane\*\*

## TABLE OF CONTENTS

Introduction .....	462
I. The Contending Doctrines of Executive Privilege ...	466
A. The Evolution of Legal Disagreement Generally	466
B. Three Theories of Executive Privilege .....	471
1. The Judicial Doctrine of Executive Privilege	471
2. The Congressional Doctrine of Executive Privilege .....	477
3. The Executive Doctrine of Executive Privilege .....	481
II. Legal Disagreement in a Government of Laws .....	484
A. Legal Interpretation and the Government of Laws Ideal .....	485
B. Conscientious Legal Interpretation and the Authority to Interpret Law Independently .....	492
III. Problem-Solving Negotiation, Legal Disagreement, and Executive Privilege .....	501
A. Case Histories of Interbranch Executive Privilege Disputes .....	501
1. James Watt: Executive Privilege and Foreign Policy .....	501

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2. Anne Gorsuch: Executive Privilege and Law Enforcement .....	508
B. The Strategy of Problem-Solving Negotiation ...	516
C. Implementing the Strategy.....	520
1. Identifying the Branches' Interests.....	520
2. Inventing Options for Mutual Gain.....	523
3. Separating People from the Problem.....	525
4. Invoking Objective Criteria for Dispute Resolution .....	528
5. The Prospects for Third-Party Intervention .	529
6. Would Problem Solving Make a Difference?.	531
D. Is Reform Possible? .....	537
Conclusion .....	541

## INTRODUCTION

The confrontations between Congress and the first Reagan Administration over executive privilege<sup>1</sup> made apparent the lack of well-ordered processes for resolving interbranch disputes over access to important information in the hands of the executive branch.<sup>2</sup> This is troubling because the invocation of executive privilege against Congress raises obvious and important questions of government accountability. Indeed, because Congress's entitlement to such information presents serious legal questions, the lack of clear processes for resolution calls into question the customary claim that ours is a "government of laws." The more Congress's access to information about the executive branch seems subject to vagaries of politics, rather than to processes of law, the greater the apparent gap between our ideals of government accountability and the reality of government practice.

Confrontations as intense as those provoked in recent

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1. In particular, the controversies stemmed from executive officials' attempts to deny Congress access to certain executive reports. See *infra* notes 117-88 and accompanying text.

2. Indeed, the 1982-83 confrontation between Congress and the executive branch over the release of Environmental Protection Agency (EPA) documents continues to have legal consequences. On April 10, 1986, the Attorney General petitioned for the appointment of independent counsel (commonly called a "special prosecutor") to investigate charges of wrongdoing by two Department of Justice officials and a deputy White House counsel in connection with their handling of the interbranch dispute. See *Justice Dept. Is to Ask for Independent Inquiry into E.P.A. Action*, N.Y. Times, Apr. 11, 1986, at A17, col. 1. The Attorney General's preliminary investigation into the charges was prompted by a four-volume House Judiciary Committee report detailing the allegations. See generally H.R. REP. NO. 435, 99th Cong., 1st Sess. (1985).

years—in particular, Anne Gorsuch's attempt to withhold Environmental Protection Agency documents and James Watt's similar attempt in the Department of the Interior—are historically exceptional, but their infrequency does not belie their importance. First, executive privilege disputes are most likely to occur over matters that involve especially significant subjects of governmental decision making, or matters that are especially sensitive politically, or both. Congress's ability to achieve access to information in such matters may well affect the substance of particularly important government decisions. It may also set the tone for executive/congressional relationships in a host of other contexts in which the relative political influence of the branches is critical.

Second, the occasions for invocation of executive privilege may well become more numerous over time because of developments in both the executive and legislative branches. On the executive side, the bureaucracy directly reporting to the President has grown dramatically in the past few decades,<sup>3</sup> and that bureaucracy has tried repeatedly to increase centralized control over the rest of the administrative apparatus of the executive branch.<sup>4</sup> As a result, there is growing policy deliberation at levels close to the President that is potentially susceptible to congressional oversight. Correspondingly, the increasing number and complexity of administrative tasks at the national level have prompted a burgeoning of congressional staff and

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3. Units of the Executive Office of the President created since 1960 include the Office of Federal Procurement Policy, the Office of Policy Development (formerly the Domestic Policy Staff), the Office of the United States Trade Representative, the Council on Environmental Quality, the Office of Science and Technology Policy, the Office of Administration and the Office of Management and Budget (formerly the Bureau of the Budget). For a description of these recently created executive offices and their enabling acts, see 1986-1987 OFFICE OF THE FED. REG., U.S. GOV'T MANUAL 79-91 (1986).

4. A series of presidential executive orders centralizing oversight of the administrative rulemaking process in the Office of Management and Budget illustrates this tendency. Exec. Order No. 12,498, 3 C.F.R. 323 (1985), *reprinted in* 5 U.S.C. § 601 at 92-93 (Supp. III 1985) (Reagan); Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 at 431-34 (1982) (Reagan); Exec. Order No. 12,044, 3 C.F.R. 152 (1979), *reprinted in* 5 U.S.C. § 553 at 70-72 (Supp. II 1978) (Carter); Exec. Order No. 11,821, 3 C.F.R. 926 (1971-1975), *reprinted in* 12 U.S.C. § 1904 at 766 (Supp. V 1975) (Ford). For discussions of the constitutional and policy issues raised by the Reagan orders, see Rosenfield, *Presidential Policy Management of Agency Rules Under Reagan Order 12,498*, 38 ADMIN. L. REV. 63 (1986) and sources therein at 89 n.151; Shane, *Presidential Regulatory Oversight and the Separation of Powers: The Constitutionality of Executive Order No. 12,291*, 23 ARIZ. L. REV. 1235 (1981).

oversight.<sup>5</sup> This growth, amid an increasing political atmosphere of "open government"<sup>6</sup> that supports executive disclosure of information, may result in more numerous occasions for the invocation of the executive privilege.

One aspect of the recent confrontations that proved a particular impediment to their efficient resolution was the deep disagreement between Congress and the Executive as to applicable legal principles. Not only did the two branches take divergent negotiating positions as to what they would accept—"full disclosure to Congress" versus "no more disclosure than the President wants"—but they also took radically opposed legal positions, each branch insisting on its ultimate constitutional authority over disclosure of the information in question.<sup>7</sup> The negotiations became, therefore, largely a jockeying over positions, with the legal opinions of each branch proffered to legitimate the negotiators' firmness.<sup>8</sup> Given the assumption of each branch that only one branch could be constitutionally correct, each branch implied that only its position could be justifi-

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5. Recent estimates indicate that the number of congressional staff grew from 7,091 in 1960 to 17,963 in 1984—an increase of over 250 percent—and the number of subcommittee staff grew during the same period from 910 to 3,183—an increase of nearly 350 percent. Broder, *Who Took the Fun Out of Congress?*, Wash. Post Nat'l Weekly Ed., Feb. 17, 1986, at 9, col. 1.

6. The Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C. § 552 (1982)), and the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified at 5 U.S.C. § 552b (1982)), which dramatically increased public access to written government records and to meetings of multiheaded government agencies, illustrate the trend in recent decades toward an "open government" philosophy.

7. For example, compare the tenor of the executive position in an advisory opinion on the scope of the privilege in response to a congressional subpoena, 5 Op. Off. Legal Counsel 27 (1981) (opinion of Attorney General William F. Smith) [hereinafter Att'y Gen.'s Watt Opinion], reprinted in *Contempt of Congress: Hearings Before the Subcomm. on Oversight and Investigations [of] the House Comm. on Energy and Commerce, 97th Cong., 1st and 2d Sess. 104 (1981-1982)* [hereinafter *Watt Contempt Hearings*] with the congressional attitude reflected in a memorandum from Stanley M. Brand, General Counsel to the Clerk of the U.S. House of Representatives, to Hon. John Dingell regarding the Attorney General's letter concerning a claim of executive privilege for Department of Interior documents [hereinafter House General Counsel's Watt Memorandum], reprinted in *Watt Contempt Hearings*, supra, at 108-17.

8. In its four-volume study of the EPA imbroglio, the House Judiciary Committee concluded that the desire to assert executive privilege in that instance arose not with the EPA, but with the Department of Justice. H.R. REP. NO. 435, 99th Cong., 1st Sess. 10 (1985). This statement implies that the executive branch was motivated more by vindication of the executive privilege principle than it was by the practical necessity of confidentiality for the EPA activities at issue.

fied by law and on the basis of the public interest that constitutional law is supposed to embody.

The purpose of this Article is to challenge that assumption, that is, that only one branch can be "correct" on a matter of separation of powers and, consequently, that interbranch dispute resolution should vindicate that one correct version of the law. Rather, government officials should view the contending legal positions of all three branches not as divergent attempts to hypothesize the correct law for all settings, but as separate attempts to crystallize each branch's independent understanding of the law. Each branch, then, has an independent doctrine of executive privilege which is entitled to primacy within the "jurisdiction" of that branch, but which deserves only coequal status with the others in other contexts.<sup>9</sup>

In so arguing, this Article does not urge that the Constitution be regarded as *not* yielding *any* answer to the problems of executive privilege. Nor should lawyers in each branch of government regard all conceivable views as equally valid. On the contrary, this Article recommends that each branch's lawyers assume a quasi-adjudicative role in determining for their respective branch the "one right answer" to any question of executive privilege. Having done so, however, they should also respect the *authority* of the other branches to arrive at different answers to the same question and to acknowledge that circumstances may at times require that the other branches' doctrines receive primacy.

Adopting this approach to executive privilege issues would have two advantages for Congress and the Executive. First, it would be conducive to a more judicious attitude toward constitutional interpretation generally within each political branch. Second, it would lend itself to a new and more constructive approach to questions of presidential prerogative that arise in the twilight zone of concurrent congressional and presidential authority.

This Article's approach has been described as "problem-solving" negotiation.<sup>10</sup> It seeks to make negotiating parties

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9. The suggestion that each branch has independent authority to interpret the Constitution is not new. See, e.g., G. GUNTHER, CONSTITUTIONAL LAW 22-24 (11th ed. 1985) (statements of Presidents Jefferson, Jackson, and Lincoln). What this Article adds to the debate is an attempt to trace systematically the implications of such authority for interbranch negotiation and the resulting professional obligations of government lawyers.

10. Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 758 (1984).

aware of their respective needs and objectives and to expand the resources available for meeting the needs and objectives of both parties. This strategy of negotiation would increase the likelihood of appropriate settlements of executive privilege disputes between the President and Congress at less cost, in time and institutional good will, than that of past disputes. This Article suggests that acceptance by each branch of the coequal respect due to the contending legal positions of the other branches will facilitate this kind of bargaining in the negotiation context.

Part I of this Article offers an explanation of how separate constitutional understandings within the government may evolve and sketches the position of each branch on executive privilege. Part II then considers the advantages for government accountability of permitting each branch an independent doctrine of executive privilege. Part II's thesis is that the attitude toward legal interpretation that this Article prefers will foster more conscientious, responsible legal interpretation. Part III, after discussing the recent *Watt* and *Gorsuch* cases, describes the problem-solving approach to the negotiation of executive privilege disputes and how such an approach might be advanced by interbranch acceptance of the "multiplicity" of constitutional doctrine.

## I. THE CONTENDING DOCTRINES OF EXECUTIVE PRIVILEGE

### A. THE EVOLUTION OF LEGAL DISAGREEMENT GENERALLY

Despite its notable commitment to legal process, the government of the United States faces inherent difficulties in achieving unitary, government-wide legal interpretation. The very distribution of power among three coequal branches of government means that each branch may evolve at least some important understandings of the law that differ from those of the other two branches. This is true even with respect to legal issues, such as the scope of the presidential war powers, that are of concern to more than one branch. In practice this means that members of one branch of government, trying assiduously to follow the law, may be following a legal theory substantially different from the theories that members of the other branches would feel obligated to follow if faced with the same legal question.

The possible occasions for judicial legal interpretation that may differ from interpretations by the other branches are con-

spicuous and familiar. Any proper lawsuit against the United States on a constitutional issue raises the possibility that a federal court may disagree with the constitutional views embodied in the actions of another branch. Such disagreement is expressed in the form of a legal judgment.

Although less familiar, occasions for constitutional disagreement are potentially just as numerous between the political branches. On a variety of important questions, Congress and the President may entertain substantially different constitutional interpretations which may never be adjudicated in court and, indeed, may never provoke any notable confrontation between the political branches themselves. For example, each branch has some leeway to interpret the Constitution with respect to those of its own initiatives that do not require cooperation from the other political branch. Congress may decide not to enact legislation that it presumes to be unconstitutional.<sup>11</sup> Such an action by Congress could never evoke a formal legal response by the courts and need not evoke a legal opinion from the executive branch because failed bills are not presented to the executive for approval or veto. Similarly, the executive branch may veto legislation because of its asserted unconstitutionality or may decline to propose legislation because of constitutional doubts.<sup>12</sup> Again, no judicial review of either sort of decision exists and Congress may choose, even in response to a veto, not to challenge the Executive's constitutional understanding.

Further, even when the political branches are interdependent for the implementation of either branch's initiatives, their legal views may never be reconciled because means of cooperation can be found that do not require their differences to be resolved. One obvious example is the political branches' divergent legal assessments of the scope of the President's

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11. Congress's repeated refusals to limit the Supreme Court's jurisdiction to hear certain classes of constitutional cases exemplify this possibility. See G. GUNTHER, *supra* note 9, at 47-48.

12. On July 10, 1832, President Jackson vetoed the bill to recharter the Bank of the United States, asserting that [i]t is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision.

Veto Message of Andrew Jackson on Bill to Recharter the Bank of the United States, reprinted in G. GUNTHER, *supra* note 9, at 22-23.



power, pursuant to his authority as commander in chief,<sup>13</sup> to engage American troops in military action abroad without a congressional declaration of war. Congress and the executive branch have articulated notably different understandings of that power,<sup>14</sup> but their disagreement has not produced any practical impasse.<sup>15</sup> The war powers example is also instructive because it reminds us that major legal disagreements between the political branches can not always evoke a judicial settlement. The Supreme Court has never articulated a view on the general scope of presidential war power.<sup>16</sup>

The absence of judicial precedent on this and other legal questions dividing the political branches is not surprising. Before a federal court will entertain a challenge to the legal position of one of the other branches, at least one branch must act in a way that poses actual or imminent injury to a private party so as to create article III standing in that party to pursue a suit in court. Many disputes between the political branches may arise without yielding such a plaintiff and substantial problems exist in recognizing one political branch's "standing" to sue the other.<sup>17</sup> Additionally, even if a plaintiff with standing exists to

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13. See U.S. CONST. art. II, § 2, cl. 1.

14. Compare Meeker, *The Legality of United States Participation in the Defense of Viet-Nam*, 54 DEP'T ST. BULL. 474, 484 (1966) ("[The President's commander-in-chief] duties carry . . . the power to deploy American forces abroad and commit them to military operations when the President deems such action necessary to maintain the security and defense of the United States.") with War Powers Resolution, 50 U.S.C. § 1541(c) (1982) ("The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities . . . are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States . . .").

15. A notable illustration involved President Reagan's use of Marines in Lebanon. There, a political compromise obviated any need to reconcile the branches' differing views on the constitutionality of the War Powers Resolution. See Multinational Force in Lebanon Resolution, 50 U.S.C. § 1541 (Supp. III 1985) (effective Nov. 22, 1983).

16. The leading case—indeed, nearly the only relevant case—concerns the status of President Lincoln's blockade of the southeastern coast of the United States following a Confederate attack on Fort Sumter, a military action undertaken without a declaration of war. See *The Prize Cases*, 67 U.S. (2 Black) 635 (1862). The Court held, by five-to-four vote, that the blockade constituted a lawful act of war within the President's commander-in-chief duties and not merely an exercise of his power faithfully to execute the statutory laws of the United States in the face of domestic insurrection. This holding could be read broadly to support the executive branch view, read narrowly to support Congress's view, or, one presumes, read still another way to support yet different views that the Justices may hold, but have had no occasion to express.

17. See, e.g., *Barnes v. Kline*, 759 F.2d 21, 41 (D.C. Cir. 1985) (Bork, J., dissenting) (disputing the existence of congressional standing to litigate disputes

challenge the position of a branch in an interbranch dispute, the courts may forbear adjudication because of the "political question" doctrine.<sup>18</sup> It is for this reason, in particular, that an interbranch dispute on the scope of the President's war powers is unlikely ever to provoke definitive judicial resolution.<sup>19</sup>

Thus, numerous occasions exist for the political branches to interpret the Constitution differently from one another. In addition, their respective interpretations may have significant practical consequences within each branch. For example, the President, given his view of presidential war powers, may devote substantial effort to preparing military contingency plans that Congress, if asked, would not sanction as solely presidential initiatives. Congress, thinking itself entitled to all executive branch information, may adopt rules for dealing with sensitive information obtained from the executive branch that would be unnecessary were it to acquiesce in the executive branch's control of all such information.<sup>20</sup>

When divergences occur between the political branches on matters of constitutional interpretation, it seems natural to regard them as disagreements on what is the one correct interpretation of the law. Both may have it wrong, but both cannot have it right. This characterization of their differences of opinion, however, is not inevitable. For example, our legal system permits different states to interpret tort law differently, even under the same rubric of "negligence," unless and until Congress may decide to impose a uniform rule pursuant to its legislative powers. Different federal courts of appeals may interpret federal constitutional or statutory law differently unless and until the Supreme Court resolves the conflict. In short, there are many important situations where we regard law-interpreting institutions as having authority to disagree on the meaning of law, at least until another institution with perceived superseding jurisdiction to resolve the disagreement does so. The au-

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between Congress and the President), *vacated sub nom.* *Burke v. Barnes*, 107 S. Ct. 734 (1987).

18. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (describing the circumstances in which the political question doctrine is properly invoked).

19. Cf. *Mora v. McNamara*, 389 U.S. 934 (1967) (Stewart and Douglas, JJ., dissenting) (urging the Court to squarely face important issues as to the President's war powers by granting certiorari in this case), *denying cert. to* 387 F.2d 862 (D.C. Cir. 1967).

20. For examples of such rules, see Senate Standing Rule XXIX(6), *reprinted in* S. DOC. NO. 1, 98th Cong., 1st Sess. 61 (1984); House of Representatives Rule XLVIII(7), *reprinted in* H.R. DOC. NO. 271, 97th Cong., 2d Sess. 692-96 (1983).

thority to interpret law independently extends to the boundaries of that institution's "jurisdiction."

It therefore seems plausible to ask whether each of the political branches may also have a jurisdiction within which it is permitted to interpret the Constitution independently and within which its particular interpretations are entitled to be regarded as law. This suggestion seems all the more plausible in light of two easily overlooked points. First, however deep the branches' legal disagreements, there may be important contexts in which no branch has any functional interest in overturning the other branches' legal views. That is, there is no pressing need not to respect each branch's independent authority. For example, even if Congress and the President disagree on the scope of executive privilege, Congress has no reason to begrudge the President routine power to manage sensitive information within the executive branch as if the ultimate responsibility for protecting the national interest in the secrecy of such information is his. Conversely, the President can hardly oppose congressional efforts to adopt rules for the protection of sensitive information in the hands of Congress, even where such rules are formulated in part on the disputed assumption that Congress is routinely entitled to confidential information possessed by the Executive.

The second point is that, on matters that the judiciary has not addressed, it may be difficult to determine in any principled way which political branch's constitutional views are authoritative. Both legal positions may be colorable, even strongly so, and their respective entitlements to authority—based on who is articulating them—may be equal.

These observations prompt the hypothesis that it is possible to view the branches' legal interpretations not merely as contending positions awaiting reconciliation, but as independent doctrines. A particular branch's interpretation would be entitled to respect in some contexts, perhaps irrelevant in others, and, in certain limited situations, in need of settlement by an extraneous decision maker. Under this conception, even the courts' version of the law would be but a competing doctrine—one that informs the other branches, but is not always dispositive. Each branch's area of decision-making competence would end only where the proper functioning of government compels another branch to have primacy or where there is some other compelling constitutional reason for regarding another branch as authoritative. Before pursuing the consequences of such a

conception in Parts II and III of this Article, it is worthwhile to review the currently contending doctrines of executive privilege enunciated by each branch.

## B. THREE THEORIES OF EXECUTIVE PRIVILEGE

### 1. The Judicial Doctrine of Executive Privilege

The easiest of the three branches' doctrines to explicate is the judicial doctrine of executive privilege. This is true for two reasons. First, several commentators have already subjected the judicial doctrine of executive privilege to searching and helpful analyses.<sup>21</sup> Second, the conventions as to what constitutes law for the federal judiciary—namely, case decisions rendered within a known hierarchy of authority—are much more firmly established than are the analogous conventions for determining the doctrines of the other two branches.

The Supreme Court has not adjudicated any executive privilege dispute with Congress, and thus no one opinion exists that purports to resolve definitively, from the judicial point of view, the principled contentions that such disputes might involve. Several Supreme Court decisions strongly imply, however, what the Court's view would be on a number of these contentions.

Of central importance is the 1974 opinion in *United States v. Nixon*,<sup>22</sup> which held that the President has a constitutionally based, but defeasible, privilege to withhold information from a court based on a generalized claim of presidential confidentiality.<sup>23</sup> The Court identified as the constitutional basis for the privilege "the supremacy of each branch within its own assigned area of constitutional duties,"<sup>24</sup> and "the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties."<sup>25</sup> The Court was untroubled that the

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21. See, e.g., R. BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* (1974) (including bibliography); Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383 (1974); Freund, *Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13 (1974); Sofaer, *Executive Privilege: An Historical Note*, 75 COLUM. L. REV. 1318 (1975); Sofaer, Book Review, 88 HARV. L. REV. 281 (1974) (reviewing BERGER, *supra*). See also sources cited in F.I. GREENSTEIN, L. BERMAN & A. FELZENBERG, *EVOLUTION OF THE MODERN PRESIDENCY: A BIBLIOGRAPHICAL SURVEY* Nos. 143-152 (1977).

22. 418 U.S. 683 (1974).

23. *Id.* at 712-13.

24. *Id.* at 705.

25. *Id.*

Constitution makes no express provision for executive privilege. Instead, citing the holding of *McCulloch v. Maryland*<sup>26</sup> with respect to the implied powers of Congress, the Court held that a presumptive executive branch privilege of nondisclosure could follow by analogous implication from those powers of the President that are express.<sup>27</sup>

In addition to concluding that a constitutional basis exists for invoking executive privilege against courts, the *Nixon* opinion is significant for two reasons. The first is its holding that the claim of privilege in that case was overcome by the institutional need of the trial court to have the information necessary to secure "the fair administration of criminal justice."<sup>28</sup> Putting aside whether the Court's balancing in *Nixon* was entirely persuasive,<sup>29</sup> it is a central element of the Supreme Court's doctrine that a claim of executive privilege may be weighed against the powers of the courts to perform their assigned constitutional tasks.

The other critical point from *Nixon* is the Court's implication that different claims of privilege may be accorded different weights according to the bases of the claims. Thus, the Court distinguishes at length the generalized interest in the protection of confidential presidential communications invoked in *Nixon* from narrower claims of privilege based on military and state secrets, as to which "the courts have traditionally shown the utmost deference to Presidential responsibilities."<sup>30</sup>

The Court in *Nixon* expressly reserved any question concerning "the balance between the President's generalized interest in confidentiality . . . and congressional demands for information."<sup>31</sup> It is thus not entirely certain whether the Court would recognize any constitutionally based privilege against Congress or, if it did, whether its balancing approach would be the same. On the other hand, it is hard to imagine that the Court would recognize a constitutionally based privilege of nondisclosure to the courts that would not also be relevant to a contest with Congress.

The *Nixon* case is consistent with the Court's modern bal-

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26. 17 U.S. (4 Wheat.) 316 (1819).

27. *Nixon*, 418 U.S. at 705 & n.16.

28. *Id.* at 713.

29. The Court's analysis is forcefully questioned in Van Alstyne, *A Political and Constitutional Review of United States v. Nixon*, 22 UCLA L. REV. 116 (1974).

30. *Nixon*, 418 U.S. at 710.

31. *Id.* at 712 n.19.

ancing approach to separation of powers problems that are not squarely addressed by constitutional text.<sup>32</sup> A separation of powers claim is recognized whenever the initiative of one branch substantially interferes with the power of another to accomplish its constitutional tasks.<sup>33</sup> In such a case, the initiative must be justified by some overarching governmental interest. Given this general approach, the Court would surely find those executive branch responsibilities supporting the existence of privilege in *Nixon* to be no less deserving of constitutional concern when the threat to the fulfillment of those executive duties emanates from an extrajudicial source such as Congress.

The two relevant court of appeals decisions on executive privilege against Congress are consistent with this analysis. Less than two months before *Nixon*, the United States Court of Appeals for the District of Columbia Circuit, in *Senate Select Committee on Presidential Campaign Activities v. Nixon*,<sup>34</sup> upheld the district court's refusal to enforce a Senate committee subpoena against Richard Nixon for the "original electronic tapes" of five conversations between Nixon and John Dean.<sup>35</sup> The court of appeals recognized a presumptive executive privilege to protect the confidentiality of presidential communications<sup>36</sup> and, in the peculiar context of this case, held that the presidential privilege outweighed the need for the subpoenaed tapes by the Senate Select Committee on Presidential Campaign Activities.<sup>37</sup> The court stated that, because of a concurrent House Judiciary Committee investigation, the Senate Committee's "oversight need for the subpoenaed tapes [was], from a congressional perspective, merely cumulative."<sup>38</sup> The Committee's need for the tapes in aid of its legislative function was likewise limited because the Committee pointed "to no spe-

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32. See, e.g., *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 442 (1977) (taking a "pragmatic, flexible" approach to separation of powers).

33. *Id.* at 443 ("[I]n determining whether the [Presidential Recordings and Materials Preservation] Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions.").

34. 498 F.2d 725 (D.C. Cir. 1974) (en banc).

35. *Id.* at 733.

36. *Id.* at 730.

37. *Id.* at 732.

38. *Id.* at 732. Copies of all the subpoenaed tapes had been delivered to the House Committee on the Judiciary in connection with the Nixon impeachment inquiry, four of the five original tapes had been delivered to the district court in connection with the Watergate prosecutions, and the President had already released partial transcripts of the tapes at issue. *Id.* at 732-33.

cific legislative decisions that [could not] responsibly be made without access to materials uniquely contained in the tapes or without resolution of the ambiguities that the [released] transcripts may contain."<sup>39</sup> This reasoning thus presaged the *Nixon* Court's decision in both recognizing a presumptive, constitutionally based privilege in the President and in implying that the privilege was defeasible.

Three years later, the United States Court of Appeals for the District of Columbia Circuit followed an approach similar to its earlier *Senate Select Committee* approach in monitoring an interbranch executive privilege dispute in *United States v. AT&T*.<sup>40</sup> The dispute arose when the Subcommittee on Oversight and Investigations of the House Interstate and Foreign Commerce Committee subpoenaed from AT&T documents pertaining to certain warrantless wiretapping that the United States, with the assistance of AT&T, assertedly conducted for national security reasons. The Department of Justice sued AT&T to enjoin compliance with the subpoena on the ground that public disclosure of the Attorney General's letters requesting foreign intelligence surveillance of particular targets would harm the national security. The chair of the House subcommittee intervened, on behalf of the House, as the real party defendant.<sup>41</sup>

Rather than resolve the dispute on its merits, the court of appeals remanded with a suggestion that the parties negotiate a settlement under guidelines proposed by the court.<sup>42</sup> The Justice Department then offered to give the subcommittee expurgated copies of the backup memoranda upon which the Attorney General based his decisions to authorize wiretaps in lieu of the demanded documents.<sup>43</sup> Information identifying the wiretap targets would be replaced by generic descriptions written by the Department.<sup>44</sup> Negotiations broke down over a procedure for assuring the subcommittee of the accuracy of the descriptions.<sup>45</sup>

When the case returned to the court of appeals, the court ordered a procedure approximating the Justice Department's

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39. *Id.* at 733.

40. 551 F.2d 384 (D.C. Cir. 1976).

41. *Id.* at 385; *United States v. AT&T*, 567 F.2d 121, 123 (D.C. Cir. 1977) (appeal of 551 F.2d 384 after remand).

42. 551 F.2d at 385.

43. 567 F.2d at 124-25.

44. *Id.* at 124.

45. *Id.*

final offer.<sup>46</sup> It based its order essentially on three premises. First, the court divined a constitutional requirement of interbranch compromise: "[E]ach branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation."<sup>47</sup> Second, a court has power to balance the competing interests of President and Congress in a properly presented separation of powers case.<sup>48</sup> Third, in proffering a settlement to Congress, the executive branch is entitled to respect for both its institutional interests and for its presumptive good faith, but Congress is likewise entitled to continuing judicial vigilance to assure that its oversight interests are fully protected.<sup>49</sup>

Supreme Court precedent relevant to interbranch privilege disputes also includes cases upholding Congress's general investigative powers. Just as the Court in *Nixon*, without textual support, recognized a constitutionally implied executive power to resist disclosure of presidential communications, the Court, without textual support, has recognized a constitutionally implied congressional power of investigation. The leading case, *McGrain v. Daugherty*,<sup>50</sup> arose from a Senate investigation into alleged corruption in the Justice Department under former Attorney General Harry M. Daugherty. The Court overturned a lower court order that had discharged Daugherty's brother from his obligation to testify before a Senate select committee investigating the alleged abuses.<sup>51</sup>

In upholding the committee's subpoena, the Court made two critical determinations. The first was that "the power of inquiry—with process to enforce it—is an essential and appro-

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46. *Id.* at 131-32. The Justice Department, relaxing its position, had offered to permit the Subcommittee to inspect 10 randomly selected unexpurgated memoranda for purposes of verification, as well as all expurgated memoranda, for the two sample years. *Id.* at 130-31.

47. *Id.* at 127.

48. *Id.* at 126-28.

49. *Cf. id.* at 131 n.34 (indicating that a small sample of 10 documents, although not large enough to be statistically representative of the whole, was large enough to meet the congressional objective of "deter[ring] high officials, in whom special trust and confidence have been reposed, from any tendency to manipulate or deceive"). Thus, under the court of appeals procedure, the district court would mediate, by in camera inspection and further remedial action, subsequent issues of accuracy and fairness, subject to appellate review. *Id.* at 131-32.

50. 273 U.S. 135 (1927).

51. *Id.* at 137, 182.



priate auxiliary to the legislative function"<sup>52</sup> and is, therefore, implicitly vested in Congress by the Constitution. The second was that, although this power exists only in aid of the legislative function, Congress need not have before it a specific legislative proposal in order for its authority to be triggered. No such specific proposal existed in *McGrain*. It was sufficient that the Court could conclude from the face of the subpoena: "Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit."<sup>53</sup>

The crux of the judicial doctrine of interbranch executive privilege disputes thus appears to be as follows: Congress has a constitutionally based power to demand information pursuant to investigations in aid of its legislative and oversight functions. The President, on the other hand, has a constitutionally based privilege to withhold disclosure of information, the release of which would impede the performance of executive branch responsibilities. A presumptive claim of privilege may be asserted to protect even the President's generalized interest in confidential deliberations. Executive privilege, however, is defeasible, and a claim of privilege based on a generalized interest in confidentiality may carry less force than narrower claims based on military and state secrets.

Before concluding, one institutional point is worth noting. The congressional and executive branch doctrines of executive privilege that follow may well appear self-serving. Therefore, one feature of the judicial doctrine that makes it attractive is its appearance of institutional disinterest. The judicial doctrine of executive privilege is, however, tacitly as responsive to the institutional interests of the courts as are the contending doctrines of the other branches to their respective interests. It is true that the Court recognizes a presumptive claim of executive privilege, even against a court, but the judiciary purports to remain the ultimate arbiter of that privilege. The Court's legitimation of the constitutional powers of Congress and President to demand and withhold information, respectively, does not undermine the Court's self-declared power to balance the interests of competing branches. Indeed, the appearance of judicial self-restraint in the D.C. Circuit cases in second-guessing presidential claims of privilege is unsurprising from a political point of view because the courts have nothing to gain and much to

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52. *Id.* at 174.

53. *Id.* at 177.

lose from a more confrontational stance. The D.C. Circuit's exhortation to reasoned compromise is perfectly consistent with a judicial recognition that the courts cannot profit from risking putatively final resolutions of interbranch impasses that directly involve neither individual rights nor the powers of the courts.

This is not to say that the judicial version of the law is entirely suspect because of its consistency with the courts' institutional self-interest. Indeed, there are oft-cited explanations why judicial indulgence of institutional interest is a less threatening phenomenon than self-serving initiatives by the political branches.<sup>54</sup> In considering whether to prefer an attitude towards legal interpretation that gives unquestioning primacy to the judiciary's interpretive role, however, we should not permit the relative subtlety of the courts' political interests to blind us to their doctrinal impact.

## 2. The Congressional Doctrine of Executive Privilege

Congress's legal understanding of executive privilege is more difficult to divine than that of the courts because relevant statutes address the issue only obliquely and because, other than statutes, conventional formats for expressing congressional legal opinion are not well established.<sup>55</sup> Congress does make law predominantly by enacting statutes and it is arguable that Congress can formulate a legal doctrine only by positively legislating.<sup>56</sup> Under that premise, congressional "law" respect-

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54. See, e.g., Karst & Horowitz, *Presidential Prerogative and Judicial Review*, 22 UCLA L. REV. 47, 56 (1974) (arguing that courts are better suited to the articulation and development of constitutional principle than are the political departments because they examine constitutional values in light of concrete situations, they are free from active policy making, and "they normally satisfy the hope that the umpire 'is not practically, even though he may be theoretically, deciding his own case'").

55. It could be argued that any search for constitutional interpretation by Congress is especially misguided because of doubts as to Congress's institutional capacity to engage in constitutional interpretation meaningfully. See Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C.L. REV. 587 (1983). For a thoughtful defense of Congress in this respect, see Fisher, *Constitutional Interpretation By Members of Congress*, 63 N.C.L. REV. 707 (1985). On the duty of lawmakers to interpret the Constitution, see Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

56. Cf. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 952 (1983) (invalidating one-House "legislative vetoes" because such vetoes are essentially legislative in purpose and effect and are subject to the bicameral and presentment requirements of article I, § 7).

ing executive privilege would exist only to the extent that Congress has enacted a statute addressing the problem.

Congress does, however, make law other than by legislating. This is clear with respect to its internal procedures, where rules and precedents that it establishes are followed although not statutorily embodied.<sup>57</sup> Congress may also make law through custom, which the Supreme Court has recognized in treating custom as a source of decisional authority in separation of powers cases.<sup>58</sup>

It is not a novel idea, of course, that a political authority can establish legal norms without formal legislative action. The very concept of international law is largely dependent on the possibility of creating law without positive enactments by formal lawmaking bodies. Under one jurisprudential theory, norms arise from assertedly authoritative statements of policy by nations or by international agencies that are capable of enforcing those statements.<sup>59</sup>

The insight that norm prescription can occur without posi-

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57. See U.S. CONST. art. I, § 5, cl. 2.

58. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (upholding executive orders issued to settle dispute provoked by Iranian seizure of U.S. embassy which provided for suspension of private litigation against Iran in the United States, in part because of the "history of [congressional] acquiescence in executive claims settlement."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (concluding that traditional ways of conducting government supply meaning to the Constitution or legislation); *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-473 (1915) (upholding presidential reservation of public oil lands from private development, notwithstanding apparently contrary statutory prohibition, in part because Congress's past acquiescence to similar orders implied its authorization for the reservation); see generally Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U.L. REV. 109 (1984).

59. This statement tries to encapsulate, without the daunting terminology, the helpful methodology originated by Professors Myres McDougal and Michael Reisman for norm identification in international law which they describe as the "coordinate communication flow" theory. McDougal & Reisman, *The Prescribing Function in World Constitutive Process: How International Law is Made*, 6 YALE STUD. WORLD PUB. ORD. 249, 250-54 (1980). In their view, a prescriptive communication or legal norm conveys "policy content, [an] authority signal and [a] control intention." Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC. INT'L L. PROC. 101, 108 (1981). Policy content is, of course, the rule or command asserted by the statement in question. *Id.* The "authority signal" is a statement to the intended audience of the legal communication that the norm-prescribing agency is the appropriate lawmaker. *Id.* at 110. The "control intention" is "a credible communication that those who are prescribing intend to and can make . . . controlling" the norms they prescribe. *Id.* at 111. For an illustrative application of the approach in a problematic context, see Weston, *Nuclear Weapons Versus International Law: A Contextual Reassessment*, 28 MCGILL L.J. 542 (1983).

tive legal enactment is critically helpful in interpreting Congress's informal law respecting executive privilege and Congress. Two episodes involving James Watt and Anne Gorsuch,<sup>60</sup> for example, resulted in statements about the law by counsel to the clerk of the House that contained explicit policy content, were intended to be understood as authoritative, and conveyed an implicit communication of Congress's capacity to enforce its views vis-a-vis the executive branch.<sup>61</sup> Their attractiveness as documents for helping to elaborate Congress's doctrine of interbranch executive privilege is enhanced by the readiness with which they can be reconciled with the prevailing interpretation of the most relevant statutes and a satisfactory "reading" of congressional custom.<sup>62</sup>

With that background, the broad outlines of a congressional doctrine of executive privilege are fairly clear and unsurprising. First, Congress asserts its plenary authority to demand executive branch information in connection with any properly authorized legislative oversight hearing. For example, the Freedom of Information Act,<sup>63</sup> which exempts large categories of executive branch records from mandatory public disclosure, expressly disclaims the application of those exemptions to con-

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60. See *infra* notes 117-88 and accompanying text.

61. See House General Counsel's Watt Memorandum, *supra* note 7, reprinted in *Watt Contempt Hearings*, *supra* note 7, at 108-17; Memorandum from Stanley M. Brand, General Counsel to the Clerk, U.S. House of Representatives, to Elliot H. Levitas, Regarding Attorney General's Letter Concerning Subpoena for Documents to Administrator of Environmental Protection Agency (Dec. 8, 1982) [hereinafter House General Counsel's Gorsuch Memorandum], reprinted in CONTEMPT OF CONGRESS: REPORT OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION ON THE CONGRESSIONAL PROCEEDINGS AGAINST ANNE M. GORSUCH, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, FOR WITHHOLDING SUBPOENAED DOCUMENTS RELATING TO THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980, H.R. REP. NO. 968, 97th Cong., 2d Sess. app. 58 (1982) [hereinafter GORSUCH REPORT].

62. What is most problematic in treating the opinions of congressional counsel as sources of law is, of course, that their claimed authoritativeness would be vigorously disputed by their executive branch audience. It is problematic whether the counsel to the clerk is viewed as an authoritative lawmaker even within Congress. We need not resolve this jurisprudential problem here, however, because our immediate aim is only to elaborate what Congress would regard as the law of interbranch executive privilege if it could assume the validity of its own assertion of authority. Recent legal opinions are consistent with statements made by members of Congress over a long history and with the tenor of the most relevant statutory enactments, suggesting that these opinions satisfactorily embody the legal position of Congress.

63. 5 U.S.C. § 552 (1982).

gressional demands for information,<sup>64</sup> including the exemption generally recognized as protecting documents deemed to be protected by executive privilege.<sup>65</sup> The opinions of counsel assert additionally that no information generated at a staff level is properly subject to any executive privilege whatsoever.<sup>66</sup> Finally, there is no limitation on the subject matter of information that Congress properly may demand; even information relating to foreign relations, including international negotiations, is within Congress's purview.<sup>67</sup>

This is not to say that Congress denies the importance of withholding certain executive branch information from the public; rather, it denies the executive branch's authority to regard dissemination to Congress as public disclosure. Congress does regard itself as bound to provide for the nondisclosure of information, the dissemination of which would compromise national security.<sup>68</sup> Such responsibility may obligate a congressional subcommittee, for example, to respect a good faith executive branch demand that it receive sensitive information only in "executive session."<sup>69</sup> The authority to disclose information that a committee receives in executive session, however, would reside in the committee, never in the executive branch.

This rendition of Congress's doctrine vis-a-vis executive privilege may appear at odds with the various occasions on which subcommittees have acceded to executive insistence on nondisclosure.<sup>70</sup> It does not appear from the history of such in-

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64. *Id.* § 552(c).

65. *See id.* § 552(b)(5); *see also* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975) ("That Congress had the Government's executive privilege specifically in mind in adopting Exemption 5 is clear . . .").

66. House General Counsel's Watt Memorandum, *supra* note 7, reprinted in *Watt Contempt Hearings*, *supra* note 7, at 109.

67. *Id.*, reprinted in *Watt Contempt Hearings*, *supra* note 7, at 116-17; House General Counsel's Gorsuch Memorandum, *supra* note 61, reprinted in GORSUCH REPORT, *supra* note 61, app. at 62-63.

68. House General Counsel's Gorsuch Memorandum, *supra* note 61, reprinted in GORSUCH REPORT, *supra* note 61, app. at 62-63.

69. *See supra* note 20 and accompanying text.

70. *See generally* Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, for the Attorney General, Regarding the History of Presidential Invocations of Executive Privilege Vis-a-Vis Congress (Dec. 14, 1982), reprinted in GORSUCH REPORT, *supra* note 61, at 90, discussing past and present administrations' refusals to disclose; Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, for the Attorney General, Regarding Refusals by Executive Branch Officials to Provide Information or Documents Demanded by Congress (Jan. 27, 1983) (unpublished supplement to memorandum of Dec. 14, 1982, *supra*); STAFF OF SUBCOMM. ON SEPARATION OF POWERS OF THE COMM. OF THE JUDICIARY, 93D

stances, however, that any such occasion represents an unambiguous concession to the authority of the executive branch to withhold. Even Congress's insistence that it is empowered in every instance to demand and receive executive branch information would not require Congress to stand on its asserted authority at every opportunity.<sup>71</sup> It can only be said with confidence that there are many instances in which Congress's calculation of its own interests, its confidence in the President, and the asserted interests of the executive branch permit Congress to accommodate the executive branch, whatever its view of underlying principle.<sup>72</sup>

### 3. The Executive Doctrine of Executive Privilege

As with the legislative branch, discerning the executive branch doctrine of executive privilege provokes the jurisprudential difficulties of determining the constitutional law of a branch of government that does not engage in formal constitutional adjudication. These problems are largely relieved, however, by the constitutional vesting of executive power in a single officer, the President. Unlike a congressional counsel, committee or subcommittee, whose authority may be questionable even within Congress, the President unmistakably holds the final authority within the executive branch, even as to the law. On occasions on which the President does not personally express his views, the executive legal doctrine may be espoused by the Attorney General, who is by law and tradition the chief

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CONG., 2D SESS., REFUSALS BY THE EXEC. BRANCH TO PROVIDE INFORMATION TO THE CONGRESS 1964-1973: A SURVEY OF INSTANCES IN WHICH EXEC. AGENCIES OF THE GOVERNMENT HAVE WITHHELD INFORMATION FROM MEMBERS AND COMM.'S OF THE CONGRESS AND FROM THE COMPTROLLER GENERAL OF THE U.S. (Comm. Print 1974).

71. It is likewise true that the executive branch's willingness to submit information that might have been protected under a privilege claim to Congress does not gainsay the executive branch's asserted authority to claim privilege. The difficulty that is posed for Congress when it acquiesces in an executive branch insistence on secrecy, or for the executive branch when it acquiesces in a congressional demand for information, is justifying nonacquiescence in other instances depending on their facts. Thus, one House Judiciary Committee criticism of the executive branch's handling of the EPA dispute discussed below is that the executive branch failed to explain how the information it sought to withhold differed from earlier EPA information that had been voluntarily released. H.R. REP. NO. 435, 99th Cong., 1st Sess. 28-31 (1985).

72. See, e.g., Sofaer, *Executive Privilege: An Historical Note*, 75 COLUM. L. REV. 1318, 1321 (1975) (Congressional acquiescence may signify that Congress is willing to trust the President in some instances.).

legal representative of the executive branch.<sup>73</sup> It is executive branch practice that, unless contravened by legal developments, typically Supreme Court opinions, which have greater status as law, opinions of the Attorney General are to be regarded as binding the executive branch in legal interpretation. In sum, there are relatively few voices to be consulted within the executive branch to determine its legal position, and the intrabranch authoritativeness of those voices is clear under law and custom.

For the last eighteen years at least, presidential documents have explicitly embodied an executive branch doctrine of executive privilege. On March 24, 1969, President Nixon issued a general memorandum to the heads of executive departments and agencies concerning congressional demands for information.<sup>74</sup> The Ford and Carter Administrations left this policy intact, and a 1982 redraft by President Reagan<sup>75</sup> left untouched the core principle of that memorandum. That principle is that the executive branch "has an obligation to protect the confidentiality of some communications," but will invoke executive privilege against Congress only with "specific Presidential authorization," in the "most compelling circumstances," and "only after careful review demonstrates that assertion of the privilege is necessary."<sup>76</sup>

The scope of the President's authority to withhold de-

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73. The Attorney General's opinions

officially define the law, in a multitude of cases, where his decision is in practice final and conclusive,—not only as respects the action of public officers in administrative matters, . . . but also in questions of private right, inasmuch as parties, having concerns with the Government, possess in general no means of bringing a controverted matter before the courts of law . . . .

6 Op. Att'y Gen. 326, 334 (1854); 28 U.S.C. § 521 (1982).

74. Memorandum from President Nixon for the Heads of Executive Departments and Agencies, Establishing a Procedure to Govern Compliance with Congressional Demands for Information (Mar. 24, 1969), *reprinted in Executive Privilege—Secrecy in Government: Hearings on S. 2170, S. 2378, S. 2420 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Gov't Operations*, 94th Cong., 1st Sess. 207 (1975).

75. See Memorandum from President Ronald Reagan for the Heads of Executive Departments and Agencies, on Procedures Governing Responses to Congressional Requests for Information (Nov. 4, 1982) [hereinafter Reagan Memorandum], *reprinted in* REPORT OF THE COMMITTEE ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES ON INVESTIGATION OF THE ROLE OF THE DEPARTMENT OF JUSTICE IN THE WITHHOLDING OF ENVIRONMENTAL PROTECTION AGENCY DOCUMENTS FROM CONGRESS IN 1982-83, H.R. REP. NO. 435, 99th Cong., 1st Sess. 1106 (1985) [hereinafter DEP'T OF JUSTICE INVESTIGATION].

76. *Id.*

mandated information extends, under the executive view, to all information the disclosure of which would impede the responsible discharge of executive branch functions.<sup>77</sup> Under the Reagan memorandum, such information may include "national security secrets, deliberative communications that form a part of the decision-making process, or other information important to the discharge of the Executive Branch's constitutional responsibilities."<sup>78</sup> The last category is likely to cover the contents of investigative files assembled for law enforcement purposes, information that would disclose the identity of a government informer, or confidential, personal information about executive branch personnel.<sup>79</sup> The Reagan memorandum could be used to protect such material even if it emanates originally from staff levels considerably removed from the President. In such a case, however, a claim of privilege would require presidential familiarity with and review of the materials.<sup>80</sup>

Because the executive branch regards the protection of confidential information as necessary to protect the integrity of executive power generally, it cannot discharge that responsibility by divulging information to Congress under a promise that Congress will act responsibly in deciding whether to further disseminate the information. Such a delegation of control over information would be, in the executive view, an unconstitutional abdication of power<sup>81</sup> analogous to an unconstitutionally overbroad congressional delegation of legislative authority in a standardless statute.<sup>82</sup> Further, as attorneys general have recognized, this principled position obviates the unseemly spectacle of having the executive branch purport to decide which congressional committees are trustworthy and which are not.<sup>83</sup>

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77. *Id.*

78. *Id.*

79. See Letter from Attorney General William French Smith to Hon. John D. Dingell (Nov. 30, 1982) [hereinafter Att'y Gen.'s Gorsuch Letter], reprinted in GORSUCH REPORT, *supra* note 61, at app. 37.

80. See Reagan Memorandum, *supra* note 75, reprinted in DEP'T OF JUSTICE INVESTIGATION, *supra* note 75, at 1106-07.

81. Att'y Gen.'s Gorsuch Letter, *supra* note 79, reprinted in GORSUCH REPORT, *supra* note 61, app. at 39 ("[T]he President has a responsibility vested in him by the Constitution to protect the confidentiality of certain documents which he cannot delegate to the Legislative Branch.").

82. See, e.g., *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42 (1935) (Congress's attempt to authorize President to approve codes of fair competition under the National Industrial Recovery Act held an unconstitutional delegation of legislative power because it gave the President virtually unfettered discretion).

83. Att'y Gen.'s Gorsuch Letter, *supra* note 79, reprinted in GORSUCH RE-



A final aspect of the executive branch doctrine deserving of mention is the customary concession that the President will not invoke executive privilege to withhold information probative of official wrongdoing in the executive branch.<sup>84</sup> Prior to the Nixon impeachment investigation, Presidents had repeatedly stated that the House had the right to demand executive branch evidence in connection with such inquiries. Nixon's refusal to honor Judiciary Committee subpoenas *duces tecum* was, therefore, reported by that Committee as an article of impeachment.<sup>85</sup>

## II. LEGAL DISAGREEMENT IN A GOVERNMENT OF LAWS

The legal disagreement just described demonstrates that lawyers in each branch of government are likely to approach an executive privilege issue based on premises not shared by the other two branches. How should government lawyers respond to this fact, consistent with responsible representation of their respective client branches? In the recent executive privilege disputes, the apparent attitude of the lawyers was that one branch was right and the other was wrong, one branch was authoritative and the other branch was usurpatious. This attitude did nothing to discipline either side's tendency to assert its position in the most extreme fashion. This Part of this Article suggests that government lawyers facing separation of powers issues instead should adopt the view that each branch, within its particular jurisdiction, is entitled to interpret the Constitution for itself. Such an attitude would be conducive to more responsible intrabranch legal advice on any separation of powers question.

As a backdrop to this conclusion, Section A of this Part will discuss the relationship of legal reasoning to the "government of laws" ideal, with its emphasis on accountability and the constraint of individual whim in the processes of governance. Section A also notes the vital importance of the separation of powers doctrine in achieving that accountability and constraint. Section B of this Part then argues that the proposal that gov-

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PORT, *supra* note 61, app. at 39 (citing a 1941 letter from then-Attorney General Robert Jackson to Hon. Carl Vinson: "Unfortunately, . . . a policy cannot be made anew because of personal confidence of the Attorney General in the integrity and good faith of a particular committee chairman.").

84. *Id.*, reprinted in GORSUCH REPORT, *supra* note 61, app. at 41.

85. H.R. REP. NO. 1305, 93d Cong., 2d Sess. 4 (1974).

ernment officials regard each branch's views on the separation of powers as "law" for that branch promotes conscientious legal interpretation and thus contributes to the government of laws ideal. Part III of this Article argues finally that the proposal would also facilitate more constructive interbranch negotiations.

#### A. LEGAL INTERPRETATION AND THE GOVERNMENT OF LAWS IDEAL

The ideal of a "government of laws" has long embodied a popular concept of the kind of government we want, and it is a natural ideal to guide the development of a model for appropriate government lawyering. Supreme Court opinions invoke the government of laws ideal to help justify decisions.<sup>86</sup> Public officials routinely invoke the government of laws ideal to explain their approval or disapproval of a wide range of government conduct. It is a reasonable prediction that, as long as judges and legal scholars continue to employ explicitly normative reasoning in the discussion of constitutional problems, the government of laws ideal will be a recurring premise in such discussions.

It is likewise reasonable to assume that the government of laws concept expresses a central aspiration for our constitutional system, widely shared by government official and citizen alike. Every past and present government official could likely offer some anecdotal support for the hypothesis that this aspiration makes a difference in official behavior. It would be surprising if the record were otherwise.

The government of laws ideal plays an important role in our legal and political culture for another reason as well. Judicial opinions and political rhetoric invoke it to assert that a government of laws is not merely what we want, but, in important respects, what we have. In *Marbury v. Madison*,<sup>87</sup> Chief Justice John Marshall's clear implication was that the "appellation" of a government of laws actually describes the

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86. See, e.g., *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously."); *Sparf v. United States*, 156 U.S. 51, 102-03 (1895) (government of laws protects society and individuals by requiring that juries apply the law given to them by the court to the facts as they find them). A WESTLAW search for references in Supreme Court opinions to the government of laws ideal discovered 34 relevant references since 1926.

87. 5 U.S. (1 Cranch) 137 (1803).

government of the United States.<sup>88</sup> Therefore, a government of laws is not simply an ideal to attain, it is a currently existing state of affairs to be cherished. A prevailing sense that the government of the United States was not acting as a government of laws would leave us feeling not only that we had fallen short of our ideal, but also that we had lost some virtue already achieved.

The concept of an ideal government of laws raises the question: To what sort of government does the phrase refer? Although the concept is highly general, all references to a "government of laws, and not of people" evoke at least some image of government actors guided by more than mere whim and calculation of how much whim they may indulge with impunity. It follows, therefore, that a government of laws evidences some sort of constraint on the official pursuit of individual desire.

To achieve this sort of accountability, it is not enough to regard a government of laws as merely a rule-bound government, or a government in which similar rules apply to citizen and official alike. In a 1955 address celebrating the two-hundredth anniversary of John Marshall's birth, Justice Frankfurter spoke eloquently of the need to conceptualize a government of laws more broadly than as a government of rules:

Law is not set above the government. It defines its orbit. But government is not law except insofar as law infuses government. This is not wordplaying. Also indispensable to government is ample scope for individual insight and imaginative origination [sic] by those entrusted with the public interest. If society is not to remain stagnant, there is need of action beyond uniformities found recurring in instances which sustain a generalization and demand its application. But law is not a code of fettering restraints, a litany of prohibitions and permissions. It is an enveloping and permeating habituation of behavior, reflecting the counsels of reason on the part of those entrusted with power in reconciling the pressures of conflicting interests. Once we conceive "the rule of law" as embracing the whole range of presuppositions on which government is conducted. . . , the relevant question is not, has it been achieved, but, is it conscientiously and systematically pursued.<sup>89</sup>

Justice Frankfurter suggests, instead of a mere government of rules, a government characterized by "an enveloping

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88. *Id.* at 163 ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

89. Frankfurter, *Address: John Marshall and the Judicial Function*, in *GOVERNMENT UNDER LAW* 28 (A. Sutherland ed. 1956).

and permeating habituation of behavior, reflecting the counsels of reason.”<sup>90</sup> How does this habituation occur? The answer that would likely occur most readily to anyone who has worked in government is that it occurs through the commitment of government actors to legal compliance and, therefore, to legal interpretation as an important mode of justification for official behavior. A government of laws is a government in which law provides not only rules, but also a set of reference points such as a constitution, statutes, and judicial decisions, as well as customary methods of interpretation by which officials habitually describe, justify, and thus normatively understand their governmental acts.<sup>91</sup>

Although this conception may sound highly abstract, it is actually something basic and familiar. The starting point for its comprehension is the observation that an individual’s actions have no meaning without some set of reference points and interpretive methods by which those actions are understood. Consider the example of one person opening a door for a stranger when the two arrive at its threshold more or less simultaneously. What is the door-opener doing? Avoiding a collision? Calculating to instill a sense of indebtedness in the stranger? Getting exercise? Conventionally, both actors involved interpret the door-opening as a “courtesy,” an interpretation they manifest by a smiling nod on one side and a “Thanks” on the other. In this case, cultural convention gives the act meaning. Even without conversation, both actors share a conception of what is transpiring and why.

One set of familiar reference points by which we interpret our acts is legal. To take a mundane, albeit much discussed example, consider the act of a driver stopping at a red light despite a moral certainty that no police officer is near and that “running the light” poses no danger. What is the person doing? Resting from a hard drive? Delaying her inevitable arrival at some dreaded destination? Most of us, including the driver, would probably say that she is simply obeying the law. The primary meaning the driver attaches to the light is that of a legal requirement to stop. The impetus for actually stopping is a

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90. *Id.*; cf. Cover, *The Supreme Court 1982 Term Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4-5 (1983) (“Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.”).

91. For a discussion of conventionally recognized “legal” reference points and methods of interpretation, see generally S. BURTON, *INTRODUCTION TO LAW AND LEGAL REASONING* (1985).

sense of obligation evoked by that meaning. If a passerby were to criticize the driver for wasting time or for blocking the view, such criticisms, even if valid, would not likely overcome this sense of obligation.

It is worth noting, in this context, that the law does not seem any the less significant to us in this example because the driver, in fact, may have wanted to stop for other reasons. The driver may attach other, more egocentric meanings to the red light, including, for example, the opportunity it provides to sit and gaze at a beautiful sunset. That the red light might produce some, perhaps even considerable, stopping if there were no relevant law does not diminish our understanding that the stop is importantly an act of legal obligation.

The "government of laws" conception mentioned above suggests that, like drivers who stop at red lights, government actors should habitually understand their official behavior as acts of legal obligation. In deciding what it is appropriate to do in their official capacities, they should consider the applicable legal reference points in determining right and wrong, suitable and unsuitable. They should do so even when the moral certainty exists that no formal sanction will punish inattention to the applicable reference points. Conversely, they should regard legal justification as an important factor even when other, more egocentric, justifications would prompt the same behavior.

Thus, for example, a Justice Department paralegal trying to decide the appropriate time in which to respond to requests for information under the Freedom of Information Act should consider himself bound by the statutory ten-day limit.<sup>92</sup> He should feel this even if no one would punish him, or even complain, if he dallied an extra day. Conversely, citizens may justly regard consistent compliance with the ten-day limit as evidence of a government of laws at work. The fact that a particular paralegal is motivated by a desire to please his superiors or to complete a tedious task in the least possible time does not change this assessment; as observers, citizens perceive that they are witnessing compliance with a sense of legal obligation and they consider this fact important.

This conception of a government of laws, like a rule-based conception of accountability, obviously does not exhaust the concepts of accountability, justice, or order in society. That officials feel compelled to obey law and thus justify their acts in

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92. See 5 U.S.C. § 552(a)(6)(A) (1982).

legal terms guarantees none of these institutional virtues. Laws themselves may be unjust. The processes of legal interpretation may be sloppy, superficial, or corrupt. Yet, if officials do feel compelled to interpret their actions in legal terms, even in cases in which no sanction threatens the failure to do so, that internalized compulsion is likely to be a significant protection against arbitrariness for several reasons. These reasons suggest that a government of laws is likely to be less arbitrary than a government in which members assess their behavior solely by the measures of politics or, indeed, of moral philosophy.

One reason that an official's internalized compulsion to obey existing law helps prevent arbitrariness is that, like some other typical sources of norms, legal norms reflect social values embodying more than individual desire. Thus, a requirement of justification through law is likely to turn the official's attention to the contemplation of interests of persons other than herself who will be affected by her official acts. It is a familiar experience to perceive a problem and possible courses of conduct differently when one looks at them from an institutional, rather than from a personal, perspective. Recourse to legal justification encourages such a shift in perception.

A second reason for potential reduction in arbitrary administration of law through allegiance to legal norms is that legal norms, unlike other norms, are typically derived from processes that most, if not all, members of society regard as appropriate. Some emanate from legislatures whose susceptibility to electoral pressure renders their actions legitimate. Others emanate from courts through processes of adjudication that are widely perceived as generating what society accepts as suitable long-term principles for human conduct. Among the reasons for acceptance of norms emanating from judicial processes are the judicial necessity of confronting actual persons and their problems in the determination of law, the public's expectation that legal results will be defended in signed opinions that are expected to serve as good precedent in a range of disputes, and the luxury judges frequently have to give weight to long-term social values, which more immediate political disputes often submerge.

In sum, the compulsion to justify official acts legally turns the official's contemplation away from unadorned self-interest to prescriptive norms that are likely to contribute to order and justice and are derived through processes widely perceived as legitimate. It does so without denigrating the value of individ-

ual wisdom and responsibility in the implementation of public policy.<sup>93</sup>

That our government of laws is a government of separated powers also reinforces the vitality of law's constraint on individual whim. The distribution of different powers among the branches, with the inevitability of some confrontation, makes unavoidable some occasions on which one branch can poignantly remind another of the importance of pursuing justification through legal reasoning.

Justice Marshall's opinion in *Marbury v. Madison*<sup>94</sup> can be read from just such a perspective. In statements that were technically dicta, Marshall constitutionalized the traditional distinction in the law of mandamus between judicially reviewable ministerial acts and unreviewable political acts for which a government officer is not accountable in court.<sup>95</sup> He did so in the face of his undoubted awareness that presidential exercises of political discretion could result in constitutional violations which the courts, under *Marbury*, could not remedy. For example, it would presumably be unconstitutional for the President, with purely invidious motives, to veto those congressional enactments, and only those enactments, that had the effect of improving the social position of American Blacks. Yet, following Marshall's reasoning, no judicial sanction could enjoin such behavior. Indeed, no judicial sanction could compel Congress to override the President's vetoes, or to impeach him for his behavior.

Despite the potential for unjust results created by situations such as this, Marshall, without apparent irony, describes our government as a "government of laws" in which the "laws"

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93. This view is not intended to be read as too sanguine. Many suspect that lawyers can rationalize any behavior and are typically happy to do so. In any case where the political impetus for a course of conduct is profound, it is easy to doubt the capacity of legal rhetoric to curb short-term self-interest. Still, law is not considered unimportant in other contexts simply because it is sometimes disobeyed or, conversely, because the desirable behavior it evokes might have been prompted by other motivations in any event. It is striking how much time and expense is devoted by our government to the pursuit of legal justification for official behavior, often in contexts where no formal sanctions for extralegal or unlawful behavior exists. As examples, one can look to the thousands of legal memoranda that exist in the files of general counsels to each government agency, the opinions of the Attorneys General, the volumes of legal opinions recently published by the Office of Legal Counsel of the Department of Justice, and the processes of computerization intended to make all of this material more readily available as precedent.

94. 5 U.S. (1 Cranch) 137 (1803).

95. *Id.* at 166.

furnish a remedy for the violation of a "vested legal right."<sup>96</sup> If "laws furnish[ing a] remedy,"<sup>97</sup> in Marshall's words, were interpreted simply to mean "courts furnishing mandatory relief," Marshall's characterization of our government as a government of laws would be wrong.<sup>98</sup>

It is possible, however, to interpret *Marbury* in a different light. Each branch of the government has a role in maintaining the ideal of the government of laws. The judicial branch, as *Marbury* illustrates, is not solely responsible for providing remedies for unconstitutional behavior. Prospectively, the allegiance of the executive branch to legal norms affords a kind of preliminary injunction against such behavior. That same sense of obligation may lead Congress, in the face of necessity, to vest jurisdiction in an appropriate court to review the Executive's acts. Failing that, an obligation to impeach may arise. Such remedies may not be perfect. As in *Marbury's* case, they may fail. They do, however, exist, and *Marbury* may be read as an exhortation to their use.<sup>99</sup>

A government of laws, under this conception, is a government in which officials feel obligated to look to legal points of reference to describe and justify official behavior. This obligation is treated as important, even if not always performed well and even if, because law and political interest may coincide, it is sometimes superfluous. It is deemed important that government officials at least exercise the self-discipline of questioning

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96. *Id.* at 163.

97. *Id.*

98. *Marbury* itself would belie the "government of laws" claim because *Marbury* could not obtain judicial relief, despite Marshall's determination that *Marbury* had been denied his vested right in his commission. Marshall held the grant of mandamus jurisdiction to the Supreme Court unconstitutional. *Id.* at 175-76. No other federal court had original jurisdiction in a mandamus proceeding as of 1803. Judiciary Act of 1789, ch. 20, 1 Stat. 73. State courts could not constitutionally issue mandamus against federal officers. *M'Clung v. Silliman*, 19 U.S. (6 Wheat.) 598, 604 (1821).

99. Jefferson might have deduced this point from the discretion Marshall conspicuously exercised in choosing his rationale for decision and their shared, tacit recognition that the Court might exercise its discretion more forcefully against the President should more dire circumstances so require in the future. One conscientious response to *Marbury* might well have been not to deliver *Marbury's* commission—because Jefferson, as a matter of law, disclaimed any such obligation—but to execute and deliver a new commission to demonstrate Jefferson's intention to avoid even the appearance of injustice. Jefferson, in fact, did commission most of the justices of the peace appointed by Adams, whose commissions were not delivered. C.G. HAINES, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1789-1835*, at 246 (1944).



the legal significance of their acts and, often, of providing explicit justification for those acts in legal terms. It is the habitual commitment to this interpretive regime that perhaps most pervasively differentiates a government of laws from a government of unadorned power.

B. CONSCIENTIOUS LEGAL INTERPRETATION AND THE  
AUTHORITY TO INTERPRET LAW INDEPENDENTLY

The kind of attitude toward constitutional interpretation evidenced by both branches' lawyers in recent executive privilege confrontations does not maximize the potential for conscientious legal reasoning on which a government of laws relies. The patently adversarial cast to their opinions<sup>100</sup> signified the premises underlying that attitude. First, it was assumed that only one "right" answer existed to legal issues in dispute. Further, because the answer might ultimately be sought from a court, the political branches' lawyers might legitimately articulate their respective positions as zealous advocates might prepare their briefs.

In keeping with the suggestion that a contrary view is possible—that each branch may evolve a legal interpretation which may govern within that branch's jurisdiction and which is entitled to respect from the other branches—an alternative attitude for government lawyers is likewise available to animate their legal reasoning. Government lawyers may determine separation of powers law in a manner akin in most respects to the method followed by federal courts of appeals for legal interpretation generally. That is, each branch should regard as its law those legal conclusions that appear most sound according to conventionally accepted interpretive methods applied independently by that branch.<sup>101</sup>

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100. See *infra* notes 117-88 and accompanying text.

101. This analogy to the courts of appeals is inexact chiefly with respect to the role that Supreme Court opinions should play in the political branches' legal interpretations. Like the courts of appeals, the political branches know that the great majority of their opinions will not be reviewed by the Supreme Court. There is thus some leeway afforded the courts and, by analogy, the political branches in construing Supreme Court opinions in that not all legal "creativity" below will be second-guessed from above. Both the courts of appeals and the political branches must recognize, however, that some possibility of review does exist and, thus, their opinions must be written to some extent with the aim of appearing acceptable to the Supreme Court. The imperfection in the analogy is that, for the lower courts, acceptability of their judgments by the Supreme Court might be viewed as a matter of routine hierarchical duty. The Supreme Court is a superior judicial authority to whom they are organiza-

Political branches should advert to the judicial method for determining law because achieving a government of laws requires government lawyers to attend "judiciously" to the forms and rhetoric of legal reasoning, and lawyers will be most habituated to the counsels of reason if they regard themselves as playing a quasi-adjudicative role in the elaboration of law. This suggestion may appear odd because, in many contexts, we assume that the law is best served by lawyers playing adversarial roles. The adversarial role may seem natural for political branches in inevitable competition. The obvious problem with the adversary model for the political branches' lawyers, however, is its assumption that the adversaries are regularly and legitimately accountable to dispassionate and disinterested third-party review. In separation of powers disputes, such third-party review is almost always a distant prospect and, equally important, its legitimacy is far less clear to the disputants.<sup>102</sup> Formal sanction and the persuasion of extraneous authority are thus such distant normative considerations to the actors involved that the adversary model becomes an insufficient behavioral prescription for dealing with politically charged areas where the practical scope of official discretion is great. What is needed is a different attitude that better tempers the salutary antagonism of the branches with the public interest in workable, responsible government.

The Constitution builds into each branch's relationship to the others a necessary tension. On one hand, the branches' interrelationships have competitive aspects, which to some extent would obviously be legitimated by recognizing as law each political branch's independent assertion of legal interpretation. In the abstract, this competition is beneficial because it fulfills what the founding generation foresaw as an important check on the power of each branch.<sup>103</sup> Assuming that each branch's executive privilege doctrine will be most attentive to the institu-

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tionally bound. The political branches, however, are not subordinate to the judiciary; they are coequal with it. They may regard themselves, for important reasons, as reviewable by the courts in particular cases, but this may well have more to do with preserving a workable system by respecting a proper jurisdiction for judicial primacy than it does with a sense of obligation to the judiciary *per se*.

102. *Cf.* discussion *supra* note 101.

103. In the fifty-first Federalist paper, Madison argued that a proper distribution of governmental power could be maintained only "by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." THE FEDERALIST NO. 51, at 320 (J. Madison) (C. Rossiter ed. 1961).

tional needs of that branch, that fact is going to be healthy for government.

On the other hand, the competition among the branches must be sufficiently restrained to ensure a government that is workable and responsible. The branches must attune themselves to long-term, as well as short-term, institutional interests. It is toward this end that a government of laws most compellingly signifies a government in which officials experience "an enveloping and permeating habituation of behavior, reflecting the counsels of reason."<sup>104</sup> It is a government in which officials are habitually committed to understanding the normative significance of their acts in legal terms.

Official understanding, explanation, and justification of government conduct is likely to be most responsible, and thus most consistent with government workability, if the officials involved regard themselves as making, not just following, constitutional law. The legal opinions of Congress or of the Department of Justice are likely to be more responsible over time if each regards itself in the role of adjudicator rather than advocate, because such an attitude is more conducive to a conscientious balancing of conflicting, legally relevant interests.<sup>105</sup>

This proposition reflects common experience among lawyers. Any executive branch lawyer asked to explain the constitutional scope of executive discretion to withhold documents from Congress is going to be attentive to at least two sets of considerations: first, the institutional interests of the executive branch in the disclosure or nondisclosure of information; second, the arsenal of interpretive methods which lawyers use to reason as to the meaning of the Constitution. If such a lawyer believes her opinion must be defensible as an authoritative exposition of law, it is a plausible hope that professional pride and personal integrity will coincide to produce a legal opinion faithful to the claims of both sound legal reasoning and client interest. If the lawyer regards her opinion as only a "brief" for the executive branch side of the argument, intuition suggests that

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104. Frankfurter, *supra* note 89, at 28; *see supra* note 89 and accompanying text.

105. Cf. James Bradley Thayer's argument that judicial review threatens to undermine Congress's sense of moral responsibility for constitutional interpretation because "the correction of legislative mistakes comes from the outside," and resort to the courts "dwarf[s] the political capacity of the people." J.B. THAYER, JOHN MARSHALL 103-04, 105-08 (1901), *quoted in* A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 21-22 (1962).

the lawyer's personal psychology will tolerate a greater indulgence of client self-interest at the expense of disinterested judgment. The difference will be one of degree, to be sure, but a difference that may be important to the habituation of government lawyers to the "counsels of reason."<sup>106</sup>

One's willingness to accept this conclusion may be influenced by a qualitative assessment of the executive privilege doctrines that Congress and the executive branch have actually evolved. Except by fiat, it is difficult to choose between them when they are stated at the level of generality offered above.<sup>107</sup> There is little textual support for either; there is some historical, normative, and judicial support for both. As to authorita-

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106. It is uncertain whether the experience and recruitment pattern of lawyers likely to be involved in executive privilege disputes will have any predictable impact on their reasonableness in particular cases. Law professor and political scientist Donald L. Horowitz has argued that Department of Justice litigators—by virtue of both their experience and pattern of recruitment, and the organizationally separate, cross-agency structure of the litigation bureaucracy—are likely to be more attuned to judicial values and operating norms than are lawyers from federal program agencies. See generally D.L. HOROWITZ, *THE JUROCRACY* (1977). He argues that, as might be expected, such a group of lawyers is relatively more motivated by arguments of legal principle and long-term governmental interest, and less by arguments of parochial or short-term policy than agency lawyers committed to the program objectives of their particular agencies. See, for example, *id.* at 129 ("The Justice Department is responsible for 'the broad picture'; its mission is 'to develop in court this unified approach.'").

This insight might have important implications in the executive privilege context because Professor Horowitz's portrait of the attitude orientation of Justice Department lawyers in *litigation* is likely to apply a fortiori to the attitudes of Department of Justice lawyers who counsel the President or handle interbranch negotiations. The lawyers most likely to be involved in such matters are located in the Office of Legal Counsel (OLC), a small office charged with overseeing the Department's counseling function on important legal issues. That office is even further removed from the responsibilities of specific program administration and less likely to have allegiance to any one program or policy initiative than the litigators Horowitz studied. Its recruitment pattern is more elitist, and its professional experience includes a fair amount of quasi-adjudicative settlement of interagency disputes within the executive branch of difficult legal questions, the resolution of which typically invites the OLC to adopt adjudicative norms of detachment and generalization. Its elite status is highlighted by its unusual physical proximity to the Office of the Attorney General. It does not automatically follow, however, that because OLC lawyers are more likely than agency lawyers to be attuned to judicial operating norms that they will invariably analyze well any particular claim of executive privilege. Although their judiciousness may temper agency overenthusiasm for secrecy, the OLC lawyers' relative detachment from agency programs may lead them to undervalue agency arguments for disclosure to Congress when OLC lawyers perceive broader issues of principle to be at stake.

107. See *supra* notes 55-85 and accompanying text.

tiveness, each of these coequal branches has a colorable claim. Thus, under conventional criteria for identifying law, both doctrines are plausible candidates.

History further demonstrates that, in the main, both branches have acted responsibly pursuant to their doctrines. The integrity of their respective legal commitments is additionally evidenced by the obligations each doctrine imposes on its originating branch.<sup>108</sup> The executive branch, having claimed power to determine unilaterally the disclosability of certain information, faces both the significant administrative burden of managing sensitive information within the executive branch as well as the political risks attendant on demanding secrecy in an open society. Congress, claiming plenary power to demand information, likewise invites political risk and obligates itself to discipline those members who compromise information that should be withheld from the general public.

It is predictable that, if animated by a judicious rather than adversarial attitude, neither of the political branches' contending doctrines of executive privilege, despite their utility to the originating branch, would be shaped entirely by short-term concern for partisan interest.<sup>109</sup> Each doctrine must be formed under the pressure of the two branches' practical interdependence. Each must be formed with reference to the same kinds of interpretive methods that characterize the legal culture generally, and each will attempt to draw on the same kinds of materials, including judicial opinions, for support. Thus, even if permitting each branch to treat its own doctrine as authoritative yields only incremental benefits in the quality of official behavior, the coequal status of the branches and the degree of accountability evident in each branch's version of the law

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108. It is important to the plausibility of regarding each branch's view of executive privilege doctrine as intrabranched "law" that each branch's view carry with it certain clear implications for that branch's internal management of sensitive information. Although executive privilege is invoked within the government only in interbranch disputes, executive privilege law thus has intrabranched relevance as well. "[A] legal interpretation cannot be valid if no one is prepared to live by it. . . . The transformation of interpretation into legal meaning begins when someone accepts the demands of interpretation and, through the personal act of commitment, affirms the position taken. . . . Creation of legal meaning entails . . . subjective commitment to an objectified understanding of a demand." Cover, *supra* note 90, at 44-45.

109. For the elaboration of a thoughtful model under which Congress's behavior *in general* (including congressional/executive interactions) is understood as the pursuit of a vision of the public interest rooted in public discussion and deliberation, see generally A. MAASS, CONGRESS AND THE COMMON GOOD (1983).

strengthen the case that those benefits can be achieved at little cost.

Arguably, the inevitable attempt of the two political branches to root their respective doctrines in judicial precedent shows that it makes no difference to official behavior in separation of powers disputes whether the political branches regard themselves as each making constitutional law, or the courts are regarded as pronouncing constitutional law and the political branches as following it. In the executive privilege area, the District of Columbia Circuit's version of the law expressly contemplates a core of constitutional prerogative for both branches and an obligation for each branch to accommodate to the maximum the other branch's legitimate interests.<sup>110</sup> Whether each branch perceives itself as striving for a negotiated resolution of the dispute under its own version of the law, or as following the court's legal command to accommodate the legitimate interests of the other branch within the judiciary's interpretation of law, however, makes a difference.

The reason for this difference is threefold. Of course, it must be recognized that the substantive outcomes of particular disputes may differ only in degree, if at all, depending on the attitude each branch takes towards the question of what is law. If each branch, however, considers itself as having the authority to determine the proper scope of disclosure of sensitive information, each branch is more likely in a dispute to have assessed and to have explicated its institutional needs thoroughly and in a way that will focus accountability on that branch more readily should its demands for or handling of information appear unjustifiable in light of those professed needs.

Second, the attitude toward legal interpretation that this Article recommends should instill in each branch a respect for the other branches' coequal autonomy in the performance of its functions and in the maintenance of checks and balances. Thus, disputants should be led to look at disagreements not as occasions for one legal view to prevail over the other, but as occasions for accommodating more concrete short-term interests of the contending branches.<sup>111</sup> In other words, disputants should not regard the fact of legal disagreement as signaling that one branch is "right" and the other "wrong" nor should they focus negotiation on vindicating "the right position." Such a shift in attitude would, in turn, reduce the inclination of

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110. See *supra* notes 34-49 and accompanying text.

111. See *infra* notes 208-33 and accompanying text.

either side to adopt extreme legal positions as a matter of political strategy.

Finally, even if specific results in executive privilege disputes do not change, the habituation of lawyers of both branches to thinking, in separation of powers disputes generally, that they are interpreters of the Constitution, not just advocates, may lead to the formulation of normative positions by both branches that can be touted more responsibly as law to the courts and to the public. That is because the two branches' jurisprudential attitudes towards executive privilege law may affect more broadly their reasoning and behavior in other important separation of powers contexts.

It should also be stressed that the "judicious" stance towards legal interpretation need not undermine any advantages normally associated with the beliefs that judicial doctrine is always the law of the Constitution, no matter what the context, and that the political branches should regard themselves as constrained to follow judicial interpretation.

The more traditional approach to legal interpretation serves the government of laws ideal in two ways. First, it preserves the notion of a unitary law, allegiance to which may deter arbitrary judgment by government officials. Second, it preserves the authority of courts, which have historically been thought the safest monitors of the boundaries of each branch's powers.<sup>112</sup> Calculating the prospect of eventual reliance on the courts to enforce the branches' respective views of executive privilege might be a helpful behavioral constraint on legislative and executive officials otherwise tempted to allow short-term partisan interests to dominate decision making.

It is not necessary to give automatic primacy to judicial doctrine, however, to assure a law that is workable in the sense that there appears to each government official a reasonably ascertainable set of answers to legal questions on which the official may rely in order to avoid merely idiosyncratic conduct. The recognized primacy of the executive or of legislative doctrine would still preserve the unity of the law. Indeed, even if there were three "laws" of executive privilege—executive, congressional, and judicial—the law would appear coherent to the actors within each branch. All follow their respective branch's doctrines, subject to the occasional demand in particular cases

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112. See, e.g., *THE FEDERALIST* NO. 78 (J. Madison) (C. Rossiter ed. 1961) ("In unfolding the defects of the existing Confederation, the utility and necessity of a federal judicature have been clearly pointed out.").

of accommodating the dictates of one branch's doctrine to the legal claims of another branch.

Further, judicial doctrine need not be given primacy in all contexts to preserve judicial authority. Judicial authority in matters of constitutional interpretation is ordinarily regarded as most important in two contexts in which actions of the federal government are challenged.<sup>113</sup> The first involves cases concerning the preservation of individual rights, where the meaningful implementation of an antimajoritarian constitutional provision may depend on its defense by an institution relatively insulated from direct majoritarian pressure.<sup>114</sup> The second involves the resolution of impasses reached by the other two branches, which defy orderly resolution without judicial intervention.<sup>115</sup> In these categories of cases, in which the political branches may find themselves in court, it is important that each be willing and able to put its case in terms that respect the court's authority because these categories establish the functionally proper jurisdiction within which judicial views should prevail.

Many separation of powers disputes, however, neither implicate individual rights directly, nor do they portend eventual impasse. The political branches, in interpreting the War Powers Resolution, for example, may have strongly contending positions but also strong incentive to reach accommodation. Individual rights may not be implicated at all in the usual sense, and the branches' disagreement will never require third-party review. There is no need, in such a situation, for the political branches internally to give great weight to the views of courts in order to assure proper deference in other cases where

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113. This, of course, puts to one side the functionally critical role of the Court, irrelevant here, in providing for the uniform interpretation of federal law among state courts. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 331 (1816).

114. See A. BICKEL, *supra* note 105, at 23-28.

115. In concurring with the Supreme Court's decision to vacate with a direction to dismiss the lower court's judgment in *Goldwater v. Carter*, a case challenging President Carter's abrogation of the mutual defense treaty between the United States and Taiwan, Justice Powell surmised:

If this case were ripe for judicial review . . . , none of these prudential considerations would be present. . . . The specter of the Federal Government brought to a halt because of the mutual intransigence of the President and the Congress would require this Court to provide a resolution pursuant to our duty to "to say what the law is."

*Goldwater v. Carter*, 444 U.S. 996, 1000-01 (1979) (Powell, J., concurring) (citing *United States v. Nixon*, 418 U.S. 683, 703 (1974), quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).



the political branches recognize that judicial intervention is important.

Some will view this argument as astonishingly naive. It rests on the premises that legal interpretation in an inter-branch dispute can be something other than posturing and that the reasoning of lawyers actually affects the resolution of political disputes. Under the traditional view, only courts pronounce law; the elucidation of law by the political branches on separation of powers questions should be viewed only as part of an implementation process that is almost entirely political in two senses. First, it is primarily partisan. Second, it is attuned only to policy, not principle. What lawyers say, according to this version of reality, is no real evidence of the quality of inter-branch interaction; the real action is largely behind the scenes, ad hoc, and entirely instrumental.

To ignore the political dimensions of separation of powers disputes or to try to characterize those disputes in purely legalistic terms would surely blink reality. An unrelievedly partisan account of government is, however, equally overdrawn and unpersuasive, especially without much more comprehensive evidence than is available on the actual resolution of interbranch disputes. My response to the cynical account is in part experiential because my perceptions of my own service in the Department of Justice lend subjective credibility to a more idealistic version of the reality of government, a version in which legal reasoning does matter.<sup>116</sup> In equal part, however, I am wary of the cynical account and committed to the argument I have advanced because the Constitution seems so strikingly to envision a government under a government of laws ideal. If it is true not only that law is a form of politics, but that law for Congress and for the President is only politics in the narrowest and most

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116. The author of this Article was an OLC attorney-adviser from 1978 through 1981. Larry A. Hammond, who was Deputy Assistant Attorney General in charge of OLC during most of this period, has written:

In many instances, . . . Jimmy Carter was not interested in playing the "lawmaker as advocate" game. . . . Carter made it known, very clearly, that if there was a legal question in a policy paper, he wanted to know whether the options were lawful or not lawful. . . . He knew that lawyers could "advocate" any position, but he wanted his Attorney General to tell him what the correct legal answer was, and he was prepared to live by it.

Letter from Larry A. Hammond to Peter M. Shane (Jan. 7, 1986). *Cf. generally* A. MAASS, *supra* note 109 (discussing congressional structure and proposing that "access by Congress to information that the Executive wishes to withhold should be decided according to the relationship of the disputed information to the duties of each of the two branches," *id.* at 251).

partisan sense, a great part of our professed constitutionalism is an illusion and much government lawyering is merely an expensive fraud upon the public.

### III. PROBLEM-SOLVING NEGOTIATION, LEGAL DISAGREEMENT, AND EXECUTIVE PRIVILEGE

The preceding Part of this Article argued that if government officials regarded each branch's views on the separation of powers as "law" for that branch—that is, as authoritative within the branch's jurisdiction—that attitude would help promote conscientious legal interpretation. The question remains whether such an attitude would be helpful or unproductive in the actual resolution of interbranch disputes. If each branch is entitled to follow its own doctrine as the law, the branches' insistence on principle might forestall efficient settlement of disputes more than if the branches regarded themselves as jointly accountable to an outside agency, such as the judicial branch.

Recent experience, however, suggests the opposite. Namely, the branches tend more to intransigent "positional" bargaining if their attitude is that only one correct version of executive privilege law exists and each branch's position is the articulation of that law. Bargaining would be more productive if the branches believed that each branch had the authority to make law within its jurisdiction and that the aim of negotiation is not to settle on one legal view as binding on both parties. The branches should perceive themselves as negotiating an immediate, concrete problem. What government needs is a theory of negotiation that steers officials, while actually bargaining, away from the vindication of doctrinal principle and toward the reconciliation of institutional interests.

Section B of this Part shows how the political branches could more successfully negotiate executive privilege disputes by employing a strategy that accepts the legitimacy of the branches' legal disagreement. To make that strategy fully comprehensible, however, Section A first describes what is publicly known about what actually occurred during the intense executive privilege disputes of the first Reagan Administration.

#### A. CASE HISTORIES OF INTERBRANCH EXECUTIVE PRIVILEGE DISPUTES

##### 1. James Watt: Executive Privilege and Foreign Policy

In early 1982, then-Secretary of the Interior James Watt

barely averted the distinction of becoming the first cabinet officer in history to be held in contempt by a house of Congress. During the previous summer, the Oversight and Investigations Subcommittee of the House Committee on Energy and Commerce requested from Watt's department all documents, including documents at the staff level,<sup>117</sup> relevant to the status of Canada under the so-called reciprocity provisions of the Mineral Lands Leasing Act (MLLA).<sup>118</sup> Watt indicated, in August 6, 1981 testimony before the subcommittee, that the Department was unlikely to divulge all of the relevant documents because some were confidential.<sup>119</sup> Just over seven months later, following full committee approval of a resolution to hold Watt in contempt of the House, the White House permitted subcommittee members to review the last of the documents that Interior had originally identified as responsive to the subcommittee demand.<sup>120</sup>

The general subject of the subcommittee's inquiry was the impact of Canadian energy and investment policies on United States energy resource companies holding assets in Canada. The hearings were prompted by allegations that the Canadian government was trying, through its policies, to devalue the assets of these companies unfairly and to provoke takeover attempts by Canadian interests.<sup>121</sup> Among the possible retaliatory steps available to the United States would have been invocation of the MLLA reciprocity provisions,<sup>122</sup> which permit foreign citizens to hold interests in mineral leases on United States public lands only if their countries provide equivalent opportunities for United States investors. Under the MLLA, Congress vested in the Secretary of the Interior the authority to determine whether foreign countries are providing reciprocal treatment for U.S. mineral investors. By the summer of 1981, Secretary Watt had not yet made a decision as to Canada. Because of the possibility that a decision adverse to Canada might help protect United States investment interests, the committee's attention had turned to oversight of Watt's decision-making process.

The chronology of give-and-take between the branches from August 1981 through March 1982 resembles, in its essen-

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117. *Watt Contempt Hearings*, *supra* note 7, at 3.

118. 30 U.S.C. § 181 (1982).

119. *Watt Contempt Hearings*, *supra* note 7, at 3.

120. *Id.* at 385.

121. See H.R. REP. NO. 898, 97th Cong., 2d Sess. 3-4 (1982).

122. 30 U.S.C. § 181 (1982).

tials, all recent major executive privilege disputes between the President and Congress.<sup>123</sup> The subcommittee's informal demand in early August 1981 elicited a turnover of roughly 200 documents on September 24, 1981, accompanied by a letter from Watt's legislative counsel asserting that executive privilege might be invoked to protect various documents not disclosed. On September 28, the subcommittee voted to subpoena the remaining documents and the subpoena was served, after further negotiation, on October 2. Watt responded by releasing an additional thirty-two documents following what he characterized as an "interagency review" of their contents. On October 13, 1981, President Reagan formally asserted executive privilege as to the final thirty-one documents.<sup>124</sup> Secretary Watt reported the President's decision in testimony to the subcommittee on October 14, 1981. At that time, Watt also asserted that the executive branch had proffered unsuccessfully "other means to familiarize the subcommittee with the contents of these papers without the necessity of providing actual copies of the documents themselves."<sup>125</sup>

In refusing Congress's request for all the documents, Secretary Watt relied on a formal opinion rendered to the President by the Attorney General upholding the President's claim of privilege.<sup>126</sup> The reasoning of the Attorney General's brief opinion was straightforward. It was grounded on three premises. First, the executive branch is constitutionally entitled to protect "quintessentially deliberative, predecisional" documents.<sup>127</sup> Second, although Congress has legitimate interests in obtaining executive branch information, its interests in information "for oversight purposes [are] . . . considerably weaker than its interest when specific legislative proposals are in question."<sup>128</sup> Third, "the congressional oversight interest will support a demand for predecisional, deliberative documents in the possession of the Executive Branch only in the most unusual circumstances."<sup>129</sup> From these premises, it followed that the documents withheld could be withheld because they all were

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123. See H.R. REP. NO. 898, 97th Cong., 2d Sess. 4-8 (1982).

124. *Watt Contempt Hearings*, *supra* note 7, at 68 (President Reagan's Memorandum of October 13, 1981 for the Secretary of the Interior Regarding Congressional Subpoena for Executive Branch Documents).

125. *Id.* at 67.

126. Att'y Gen.'s Watt Opinion, *supra* note 7, at 27, *reprinted in Watt Contempt Hearings*, *supra* note 7, at 104.

127. *Id.* at 29, *reprinted in Watt Contempt Hearings*, *supra* note 7, at 105.

128. *Id.* at 30, *reprinted in Watt Contempt Hearings*, *supra* note 7, at 106.

129. *Id.*, *reprinted in Watt Contempt Hearings*, *supra* note 7, at 107.

"either necessary and fundamental to the deliberative process presently ongoing in the Executive Branch or related to sensitive foreign policy considerations."<sup>130</sup> The Attorney General concluded, "The process by which the President makes executive decisions and conducts foreign policy would be irreparably impaired by the production of these documents at this time."<sup>131</sup>

In the ensuing months, a subplot developed as the subcommittee tried unsuccessfully to elicit the personal appearance of Attorney General William French Smith to defend his opinion. The printed hearings relating to the eventual resolution of contempt include a detailed rebuttal of the Smith opinion by then-General Counsel to the Clerk of the House, Stanley Brand,<sup>132</sup> and an exchange of testy letters between Subcommittee Chair John Dingell and the Department of Justice concerning the possibility of Smith's testifying.<sup>133</sup>

The Brand letter forcefully questioned all of the Attorney General's assertions concerning the limited investigative powers of Congress. Brand argued that, to the extent executive privilege exists, those documents that were generated at the staff level in a cabinet department could never be protected by it.<sup>134</sup> According to Brand, Congress did not interfere with any executive power in demanding such documents, and its authority to seek such information in performing its oversight function is at least as great as Congress's investigative powers in connection with legislative deliberation.<sup>135</sup>

With negotiations over the documents proceeding, the subcommittee held hearings in November 1981 on the subject of executive privilege generally and on the Attorney General's opinion.<sup>136</sup> Neither the hearings nor the continuing negotiations resolved the dispute. On February 2, 1982, without having met the subcommittee's disclosure demands, Secretary Watt announced that he had reached a decision on Canadian reciprocity favorable to Canada.<sup>137</sup> The next day, on February 3, Watt turned over nineteen of the thirty-one contested documents on

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130. *Id.* at 28, reprinted in *Watt Contempt Hearings*, *supra* note 7, at 105.

131. *Id.* at 32, reprinted in *Watt Contempt Hearings*, *supra* note 7, at 108.

132. House General Counsel's Watt Memorandum, *supra* note 7, reprinted in *Watt Contempt Hearings*, *supra* note 7, at 108-17.

133. *Watt Contempt Hearings*, *supra* note 7, at 260-66.

134. House General Counsel's Watt Memorandum, *supra* note 7, reprinted in *Watt Contempt Hearings*, *supra* note 7, at 109.

135. *Id.*, reprinted in *Watt Contempt Hearings*, *supra* note 7, at 111-15.

136. See *Watt Contempt Hearings*, *supra* note 7, at 133-281.

137. *Id.* at 318.

the ground that his reaching a final decision obviated further nondisclosure.<sup>138</sup> Six days later, the subcommittee's Democratic majority, joined by its ranking Republican member, voted to hold Watt in contempt and to report its resolution to the full Energy and Commerce Committee.<sup>139</sup>

With total compliance still not forthcoming, the full committee, on February 25, 1982, likewise voted to recommend that the House cite Watt for contempt.<sup>140</sup> This final committee action, and the virtual certainty of its approval by the full House, finally elicited settlement on the eve of the House vote. The White House agreed to permit subcommittee members four hours to review and to take notes on the remaining twelve documents. The documents would be reviewed on Capitol Hill, but would remain within the custody of the executive branch. No staff personnel could review the documents and no photocopying would be permitted.<sup>141</sup>

The immediate interests of both branches in the Watt imbroglio are superficially clear. The subcommittee wanted full access to information that might shed light on the usefulness of the MLLA reciprocity process to deal with the alleged problem of unfair Canadian policy and to consider the need to amend the MLLA or to take retaliatory measures. The executive branch insisted that nondisclosure was essential to the integrity of its deliberative processes and foreign policymaking generally. Presumably, once Secretary Watt reached his final decision, the executive branch's interest in reaching that decision without distortions wrought by premature disclosure of internal deliberations was eliminated. The executive branch would retain, however, a generalized interest in protecting its deliberations and in maintaining confidences necessary to the successful conduct of foreign relations.<sup>142</sup>

From a broader perspective, it is manifest that both branches perceived the Watt dispute in a wider legal and political context. Representative Dingell, the subcommittee chair, was also Chair of the full Committee on Energy and Commerce. From his vantage point, Watt's refusal to comply with the request for MLLA documents likely appeared part of a larger pattern of noncooperation between Watt and Congress

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138. H.R. REP. NO. 898, 97th Cong., 2d Sess. 6-7 (1982).

139. See *Watt Contempt Hearings*, *supra* note 7, at 295-96.

140. *Id.* at 368-70.

141. *Id.* at 385-86.

142. See Att'y Gen.'s Watt Opinion, *supra* note 7, at 29, reprinted in *Watt Contempt Hearings*, *supra* note 7, at 105.

over confidential information.<sup>143</sup> On the executive branch side, the Attorney General's vigorous defense of executive privilege occurred against the backdrop of a broader effort led by the Department of Justice to buttress executive branch control over the dissemination of information generated within the executive branch.<sup>144</sup> Smith's opinion is notable, for example, for the breadth with which it attempts to establish a presumptive right of the executive branch to withhold deliberative documents from congressional committees.<sup>145</sup>

It may be that the Administration was destined, because of the size of the Democratic majority in the House, to lose this

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143. See H.R. REP. NO. 898, 97th Cong., 2d Sess. at 66-70 (1982) (statement of Reps. Moffett, Ottinger, Scheuer, Waxman and Markey).

144. For example, see Attorney General Smith's revocation of former Attorney General Griffin Bell's restrictive policy concerning the circumstances under which the Justice Department would defend agencies' nondisclosure of records under the Freedom of Information Act, Wash. Post, May 5, 1981, at A11, col. 1, and the issuance of a national security directive strengthening the nondisclosure obligations of certain persons with access to classified information and subjecting such employees to possible polygraph examinations in connection with investigations of leaks, *National Security Decision Directive 84: Hearing on S. 568 Before the Senate Comm. on Governmental Aff.*, 98th Cong., 1st Sess. 85-86 (1983).

145. See *supra* notes 126-31 & 142 and accompanying text. Personality factors also may have aggravated the dispute. Secretary Watt was widely believed to be a zealot for Reagan Administration policy; Representative Dingell is widely perceived to be among Congress's most powerful and aggressive members. Cf., e.g., Peterson, *Now It's Greetinggate: EPA Strikes Back with a 'Dingellgram' of Its Own*, Wash. Post Nat'l Weekly Ed., Feb. 10, 1986, at 14, col. 1 (referring to the "dreaded 'Dingellgram'" as "more often than not, . . . a request for voluminous piles of documents, telephone logs and memos—a sure sign that the receiving agency has done something to stir the appetite of Dingell's crack staff of lawyers, whose penchant for investigatory detail is legend"); Nash, *The Power of the Subpoena*, N.Y. Times, Mar. 12, 1986, at A24, col. 4 (describing Dingell as "perhaps Capitol Hill's most zealous investigator and issuer of subpoenas"). The public communications to Dingell and the subcommittee from various Department of Justice officials assumed no pretense of deference. See, e.g., *Watt Contempt Hearings*, *supra* note 7, at 263-64 (letter of Dec. 8, 1981 from Assistant Attorney General Robert A. McConnell to Hon. John D. Dingell). The final committee report hints of personality problems at the staff level as well. H.R. REP. NO. 898, 97th Cong., 2d Sess. 68-69 (1982) (statement of Reps. Moffett, Ottinger, Scheuer, Waxman and Markey). Nonetheless, in colloquies between Dingell and Watt, and between Dingell and Rep. Marc Marks, ranking Republican on the Dingell subcommittee, the parties were at pains to emphasize the nonpersonal nature of the dispute. See, e.g., *Watt Contempt Hearings*, *supra* note 7, at 89 (colloquy between Rep. Dingell and Secretary Watt); *id.* at 286-87 (statements of Reps. Dingell and Marks); but see H.R. REP. NO. 898, 97th Cong., 2d Sess. 68-69 (1982) (statement of Reps. Moffett, Ottinger, Scheuer, Waxman and Markey) (attributing Secretary Watt's response to the committee, in part, to "ego," "pique," and "personal arrogance").

executive privilege battle, but it is also possible that the executive branch might have done better in delaying subpoena compliance without the loss of good will that resulted. Notwithstanding the strong Democratic majority, Secretary Watt, an unpopular figure, did succeed in forestalling any release of the contested documents until he had made the decision that the subcommittee wanted to oversee. Furthermore, the President's declared interest in nondisclosure was facially more compelling as a constitutional argument than some of the positions proffered by earlier administrations in like disputes.<sup>146</sup>

A reasonable hypothesis might be that at least four factors over which the Administration had some control helped to galvanize the opposition to Watt. First, Watt had been injudicious in his attempts to control information in other disputes with the Energy and Commerce Committee and had weakened his credibility generally.<sup>147</sup> Second, the Attorney General's legal opinion was extremely broad in its justification of nondisclosure to Congress and, as discussed below, some arguments were sure to be seen as overreaching.<sup>148</sup> Third, the Attorney General may have exacerbated his own credibility problem by refusing to defend the opinion personally. Fourth, lower level executive branch officials did not take pains to maintain good relations with legislative staff.

It may have been, of course, that the executive branch viewed the subcommittee investigation—and the House in general—with as much distrust as the subcommittee majority focused on Secretary Watt. The ultimate strength of the Democratic majority, however, provided a hedge that the Administration did not have against miscalculations made in the course of negotiations.

In sum, the Watt dispute does not appear to have been an

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146. See Rosenthal & Grossman, *Congressional Access to Confidential Information Collected by Federal Agencies*, 15 HARV. J. ON LEGIS. 74, 82-83 (1977) (discussing former Commerce Secretary Rogers C. B. Morton's abortive attempt to resist disclosing to Congress certain Arab boycott reports filed with the Commerce Department under the Export Administration Act of 1969, Pub. L. No. 91-184, §§ 1-14, 83 Stat. 841, 841-47 (1969) (current version at 50 U.S.C. §§ 2401-2420 (1982))); *The Petroleum Import Fee: Department of Energy Oversight: Hearings Before a Subcomm. of the House Government Operations Comm.*, 96th Cong., 2d Sess. 193 (1980) (concerning former Energy Secretary Duncan's abortive resistance to a subpoena for intra-agency documents concerning the President's imposition of an oil import fee).

147. See *supra* note 143 and accompanying text.

148. See *infra* notes 254-59 and accompanying text.



efficient process for achieving an appropriate level of disclosure to Congress in a way that would preserve the branches' ongoing relationship. The subcommittee ultimately prevailed in achieving access to all contested information, and the Administration, although it succeeded in resisting disclosure during the decision-making process, suffered significant and unnecessary damage to its credibility.

## 2. Anne Gorsuch: Executive Privilege and Law Enforcement

The most celebrated of recent privilege disputes involved Anne Gorsuch,<sup>149</sup> President Reagan's first Administrator of the Environmental Protection Agency (EPA), who became the first head of an executive branch agency to be held in contempt of Congress while in office.<sup>150</sup> The impetus for the contempt citation was Gorsuch's refusal to divulge certain documents to the Investigations and Oversight Subcommittee (Levitas subcommittee) of the House Committee on Public Works and Transportation, in connection with that subcommittee's investigation of EPA's administration of the so-called "Superfund" for the cleanup of hazardous waste dumping sites. The White House settled the dispute with the subcommittee on February 18, 1983,<sup>151</sup> slightly more than two weeks after a federal district court refused to review the legality of the House contempt citation before its enforcement.<sup>152</sup>

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, commonly known as the Superfund Act,<sup>153</sup> created a \$1.6 billion trust fund to be used for financing the cleanup of hazardous waste sites and spills of hazardous chemicals. Among other things, the Act authorizes the government to act to control a hazardous waste situation

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149. During the pendency of the dispute recounted here, Anne M. Gorsuch remarried and changed her name to Anne M. Burford. Because the earliest documents discussed herein refer to her only by the name "Gorsuch," that name is used exclusively throughout this Article for consistency.

150. H.R. REP. NO. 435, 99th Cong., 1st Sess. 3 (1985).

151. Wash. Post, Feb. 19, 1983, at A1, col. 5. The terms of the final settlement were embodied in a March 9, 1983 memorandum signed by Reps. Dingell and Broyhill and Counsel to the President Fred Fielding. *EPA Document Agreement*, 41 CONG. Q. WEEKLY REP. 635 (1983). For another account of the Gorsuch confrontation, see Note, *The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, 1983 DUKE L.J. 1333, 1334-38.

152. *United States v. House of Representatives of the United States*, 556 F. Supp. 150, 153 (D.D.C. 1983).

153. Pub. L. No. 96-510, 94 Stat. 2767 (codified in scattered sections of U.S.C.).

when a responsible party either cannot be identified timely or cannot act. Parties responsible for hazardous waste or chemical spill sites are required to reimburse the government for cleanup costs and damages to natural resources; noncooperating parties may be fined treble damages. By executive order, President Reagan delegated his functions under the Act to the EPA Administrator, who was also designated the responsible official for enforcement of the Act.<sup>154</sup>

In 1982, several House subcommittees commenced investigations of various aspects of EPA's Superfund enforcement. The Levitas subcommittee, in March 1982, commenced a general investigation of hazardous and toxic waste control, focusing on the impact of such wastes and their control on American ground and surface water resources.<sup>155</sup> Of special concern were an EPA decision to suspend its prior restrictions on disposal of containerized liquid wastes in landfills that might permit the migration of such wastes to ground and surface waters and allegations that the EPA was not adequately enforcing the Superfund provisions against parties responsible for hazardous waste sites.<sup>156</sup> On September 13 and 14, 1982, subcommittee staff requested access to EPA's files on enforcement of the Superfund Act and related statutes in so-called Region II.<sup>157</sup> Despite an early assurance of access,<sup>158</sup> EPA subsequently informed the subcommittee that it would not make available certain materials in enforcement files connected with active cases.<sup>159</sup> This dispute eventuated in the contempt citation against Administrator Gorsuch.

At almost the same time the Levitas subcommittee requested access to EPA files on Region II, the Oversight and Investigations Subcommittee (Dingell subcommittee) of the House Committee on Energy and Commerce requested documents relating to several hazardous waste sites outside Region II, on which that subcommittee's investigation of enforcement effectiveness was focusing.<sup>160</sup> Although the Dingell subcommittee's investigation did not spawn any contempt citations of its own, the coexistence of different EPA oversight hearings and

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154. Exec. Order No. 12,316, 3 C.F.R. 168 (1982), *reprinted in* 42 U.S.C. § 9615, at 1444-45 (1982).

155. *See* GORSUCH REPORT, *supra* note 61, at 7.

156. *Id.* at 9.

157. *Id.* at 11.

158. *Id.* at 13-14.

159. *Id.* at 14-15.

160. *See id.* at 15.

demands for access to enforcement files seems to have been critically important to the dynamics of the interbranch negotiation over the Levitas subpoena. The broader range of interested parties made negotiation more difficult because of the greater number of persons to satisfy, the greater likelihood that congressional access to EPA files would undermine executive control generally over the dissemination of information on Superfund investigations, and the involvement of additional strong personalities, including Representative Dingell, Secretary Watt's successful opponent.<sup>161</sup>

After the Levitas subcommittee staff demanded access to EPA enforcement files in September 1982, two weeks of unsuccessful negotiations ensued at the staff level.<sup>162</sup> EPA offered to permit staff access to its files, subject to prescreening by an EPA official to maintain the confidentiality of sensitive documents. The offer was declined. On September 30, 1982, the subcommittee authorized subpoenas to issue for the requested documents.<sup>163</sup>

Throughout most of October 1982, service of the subpoenas was postponed under EPA assurances of cooperation.<sup>164</sup> EPA continued to assert confidentiality for a limited class of litigation-related documents, but then reverted to its position of protecting all "enforcement sensitive" documents—apparently as a reaction to the issuance of a subpoena by the Dingell subcommittee for similar information. On November 22, 1982, the Levitas subcommittee served a broad subpoena on Gorsuch, demanding the documents and her testimony on December 2, 1982.<sup>165</sup>

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161. Whether the separate Dingell investigation would have made settlement more difficult apart from the alleged intransigence of Justice Department attorneys is a point Congress disputes. According to the 1985 House Judiciary Committee report on the EPA dispute, the Dingell subcommittee's minority counsel proposed a settlement that was deemed acceptable by a deputy assistant attorney general in charge of the Land and Natural Resources Division in mid-October. H.R. REP. NO. 435, 99th Cong., 1st Sess. 96-103 (1985). As the 13 Judiciary Committee dissenters noted, however, it was unclear whether this official ever told any other member of the Justice Department of the minority counsel's proposal or of his own reaction to it. *Id.* at 737-38, 777-78.

162. *Id.* at 46-70.

163. *Id.* at 70.

164. *Id.* at 10; *Hazardous Waste Contamination of Water Resources (Access to EPA Superfund Records): Hearing on H. 89 Before the Subcomm. on Investigations and Oversight of the House Comm. on Pub. Works and Transp.*, 97th Cong., 2d Sess. 88 (1982) [hereinafter *EPA Records Hearing*].

165. GORSUCH REPORT, *supra* note 61, at 15.

On November 30, 1982, Attorney General Smith released a letter to Representative Dingell, justifying the Administration's refusal to comply with a subpoena for "sensitive open law enforcement investigative files."<sup>166</sup> Smith also forwarded the letter to Representative Levitas to explain EPA's refusal to comply fully with the latter's subpoena as well.<sup>167</sup> On the same day, President Reagan issued a memorandum to Gorsuch directing that she not divulge documents from "open law enforcement files, [which] are internal deliberative materials containing enforcement strategy and statements of the Government's position on various legal issues which may be raised in enforcement actions."<sup>168</sup>

The Attorney General articulated a series of justifications for the nondisclosure of open investigative files: forestalling political influence over the conduct of an investigation, preventing the disclosure of investigative sources and methods, protecting the privacy of innocent parties named in investigative files, protecting the safety of confidential informants, and maintaining the appearance of "integrity, impartiality and fairness of the law enforcement process as a whole."<sup>169</sup> Smith indicated that no assurance of confidentiality from Congress would permit the President to share his responsibility to protect the information in question,<sup>170</sup> but nonetheless articulated one exception to the rule of nondisclosure: "These principles will not be employed to shield documents which contain evidence of criminal or unethical conduct by agency officials from proper review."<sup>171</sup>

Following the subcommittee's December 2 hearing, General Counsel Brand, on December 8, issued a legal response to the Attorney General's letter, again challenging each of his assertions as to the limitations on Congress's oversight author-

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166. Att'y Gen.'s Gorsuch Letter, *supra* note 79, reprinted in GORSUCH REPORT, *supra* note 61, app. at 37.

167. Letter from Attorney General William French Smith to Elliot H. Levitas (Nov. 30, 1982), reprinted in GORSUCH REPORT, *supra* note 61, app. at 36.

168. Memorandum from Ronald Reagan to Administrator, Environmental Protection Agency (Nov. 30, 1982), reprinted in GORSUCH REPORT, *supra* note 61, at 42-43.

169. Att'y Gen.'s Gorsuch Letter, *supra* note 79, reprinted in GORSUCH REPORT, *supra* note 61, app. at 38.

170. *Id.*, reprinted in GORSUCH REPORT, *supra* note 61, app. at 39.

171. *Id.*, reprinted in GORSUCH REPORT, *supra* note 61, app. at 41.

ity.<sup>172</sup> On the same day, Levitas met with Administration officials to attempt a settlement. Levitas made an offer: subcommittee staff could review and designate for copying and delivery to the subcommittee all EPA documents relative to the waste sites at issue. If EPA or the Justice Department designated any document selected for delivery as sensitive, it would remain at EPA for inspection there. If actual delivery to the subcommittee of any of these documents proved necessary, further subpoenas might issue. All information disclosed would be treated as confidential.<sup>173</sup>

The following day, the Attorney General declined the settlement offer, reiterating instead EPA's original offer of access subject to EPA prescreening. The only concession was that prescreened documents would be withheld ultimately from the subcommittee only after broad-based and high-level review in the executive branch.<sup>174</sup> On December 10, the full Public Works and Transportation Committee responded by recommending (in a vote along party lines) that the House hold Gorsuch in contempt.<sup>175</sup>

Six days later, the House overwhelmingly approved a resolution to certify Gorsuch's "contumacious conduct"<sup>176</sup> to the United States Attorney for the District of Columbia.<sup>177</sup> Prior to the actual certification, the Justice Department filed an extraordinary suit in federal district court to enjoin further action to enforce the subpoena on the ground of its unconstitutionality.<sup>178</sup>

The District Court on February 3, 1983 dismissed the Justice Department's suit on the ground that any constitutional issue raised by the subpoena could be resolved in a judicial proceeding brought to enforce the subpoena.<sup>179</sup> With the United States Attorney's Office still insisting that it was not

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172. See House General Counsel's Gorsuch Memorandum, *supra* note 61, reprinted in GORSUCH REPORT, *supra* note 61, app. at 58-64.

173. GORSUCH REPORT, *supra* note 61, at 20-21.

174. *Id.* at 21-22.

175. *Id.* at 23. But see *id.* at 72-76 (dissenting statement of Republican committee members).

176. H.R. Res. 632, 97th Cong., 2d Sess., 128 CONG. REC. 10,040 (1982).

177. Davis, *Gorsuch Contempt Charge Puts Focus on Enforcement of Hazardous Waste Laws*, 40 CONG. Q. WEEKLY REP. 3162 (1982).

178. See Davis, *Legal Showdown Escalating in Gorsuch Contempt Case*, 41 CONG. Q. WEEKLY REP. 11 (1983).

179. *United States v. House of Representatives of the United States*, 556 F. Supp. 150, 153 (D.D.C. 1983).

bound to enforce the subpoena,<sup>180</sup> Levitas and Reagan reached agreement on February 18, 1983 that the subcommittee would receive edited copies of all relevant documents and a briefing on their contents and then would be permitted to review any requested unedited documents in closed session.<sup>181</sup>

Although the February 18 settlement resolved the Levitas dispute, it did not end the overall imbroglio. Still pending were subpoenas from the Dingell subcommittee, which now asserted that its investigation was focusing on specific allegations of misconduct by EPA officials.<sup>182</sup> Rita Lavelle, the Superfund administrator and the most prominent of these officials, was dismissed on February 7, 1983 by the President amid allegations of her perjury to Congress and improper administration of the trust fund.<sup>183</sup>

Following the agreement with Levitas on February 18, further disclosures of possibly criminal conduct at EPA made prolonged resistance to the Dingell subpoenas politically impossible.<sup>184</sup> On March 9, 1983, Anne Gorsuch resigned as EPA administrator<sup>185</sup> and the White House agreed to deliver all subpoenaed documents to the Dingell subcommittee, subject to certain limited protections for the confidentiality of enforce-

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180. It appears that the decision not to proceed with the contempt citation was made independently by the U.S. Attorney for the District of Columbia. See H.R. REP. NO. 435, 99th Cong., 1st Sess. 19 (1985). That decision, however, reflected long-standing Justice Department policy. Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, for the Attorney General Regarding Whether the United States Attorney Must Prosecute or Refer to a Grand Jury a Citation for Contempt of Congress Concerning an Executive Branch Official Who Has Asserted a Claim of Executive Privilege on Behalf of the President of the United States (May 30, 1984), *reprinted id.* at 2544-621.

181. See *supra* note 151.

182. EPA: *Investigation of Superfund and Agency Abuses (Part 1): Hearings on H. 98 Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Com.*, 98th Cong., 1st Sess. 1-7 (1983).

183. Hoffman, *Reagan Orders Investigation of EPA Charges*, Wash. Post, Feb. 17, 1983, at A1, col. 3.

184. The House Judiciary Committee concluded from its investigation that the disputed documents contained sufficient "signposts" of wrongdoing that the executive branch *should* have recognized earlier than February, 1983 that the assertion of executive privilege in regard to the documents was untenable. H.R. REP. NO. 435, 99th Cong., 1st Sess. 9 (1985). The report does not allege, however, that the executive branch withheld the documents after the relevant officials had actual knowledge of likely EPA wrongdoing, but merely implied that the officials should have investigated the alleged "signposts" more thoroughly. See *id.* at 140.

185. *Burford Quits As EPA Administrator*, Wash. Post, Mar. 10, 1983, at A1, col. 1.

ment-sensitive materials.<sup>186</sup>

The Gorsuch episode is striking because, in defending non-disclosure, the executive branch was protecting more specific and legitimate concerns than had been articulated in connection with the Watt matter. These were further specified in a December 14, 1982 memorandum to the Attorney General from Theodore B. Olson, Assistant Attorney General in charge of the Office of Legal Counsel, who hinted at concern that members of Congress obtaining access to law enforcement files "might have relationships with potential defendants" in EPA enforcement actions.<sup>187</sup> What weakened the case for nondisclosure was not the implausibility of the executive's articulated position, but the strains on the executive branch's credibility wrought by the Watt affair<sup>188</sup> plus the credibility of the growing allegations that EPA officials were guilty at least of mismanaging the Superfund program.

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It is risky, of course, to try to infer from one or two sketches all the characteristics that may be typical of executive privilege disputes.<sup>189</sup> The two just recounted were atypical in

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186. *EPA Records Hearing*, *supra* note 164, at 371.

187. H.R. REP. NO. 968, 97th Cong., 2d Sess. 89 (1982). In fact, OLC investigated whether any of EPA's investigative targets in two areas being scrutinized by the Dingell subcommittee were political contributors to Reps. Dingell or Mike Synar of Oklahoma. H.R. REP. NO. 435, 99th Cong., 1st Sess. 124-32 (1985). A deputy assistant attorney general in charge of OLC "concluded there were some potential connections," but "all possible matchups were not pursued" and no use was made of the information. H.R. REP. NO. 968, 97th Cong., 2d Sess. 131 (1982).

188. "[T]wo matters—an executive privilege controversy involving Secretary of the Interior Watt and prior EPA informational policies with respect to Congress— . . . appear to be highly relevant to the [Judiciary] Committee inquiry [into the EPA dispute] because they shaped expectations—and perhaps motivations—in the EPA controversy itself." H.R. REP. NO. 435, 99th Cong., 1st Sess. 26 (1985).

189. There are currently 92 standing, select and special committees in Congress, and 258 subcommittees of those committees. Assuming that each of these entities lodges one information request per month with the executive branch—surely a low estimate—such requests would total 4,200 annually. If, as it appears, a very large number of information demands are being handled amicably between the branches, the Watt and Gorsuch episodes may suggest only a slight degree of human imperfection in an otherwise smoothly operating system. Perhaps the most sensible reform recommendation would be to determine how the few episodes like those just recounted differ from the 4,198 others, and try to adjust them accordingly.

The available data, however, are insufficient to show whether the disputes just recounted are sufficiently like those that are amicably resolved to render the cases comparable. As noted above, the hotly disputed cases are most likely

their protraction, and perhaps in the degree to which Congress prevailed in its demands. These and other recent episodes,<sup>190</sup> however, do share a number of notable features.

First, the sketches dramatize the sequence and variety of procedural steps available to Congress to aggravate or mitigate the pressure for resolving an executive privilege dispute. The pattern is not a three-step dance of subpoena, refusal, and contempt citation. In each instance, there was an initial informal demand, negotiation, a subpoena, further negotiation, a subcommittee vote, further negotiation, a committee vote, and—in the Gorsuch case—further negotiation, a House vote, and still further negotiation. The subcommittee overseeing Watt both turned up the pressure on the executive and bought some time for deliberation by holding hearings on the subject of executive privilege generally, in addition to the hearings on the substantive problem in dispute.

The two sketches also highlight the possibilities for compromise inherent in the various forms in which access to information may be provided and in the schedules for compliance. The negotiations involved not just one issue, disclosure, but several issues; namely, the timing, form and conditions of disclosure. If there were objective criteria for gauging the wisdom of various potential agreements, genuine compromise possibilities might routinely exist by making tradeoffs among these three issues.

As precedent, however, the disputes just related send a mixed message regarding the potential for future accommodation. On one hand, these disputes are part of a body of practical precedent in which the branches have, however painfully, found room for accommodation without documented cost to the public interest. On the other hand, the executive privilege disputes served to illustrate the opportunity and capacity that different branches of government have to develop different understandings of the relevant law.<sup>191</sup> In the Watt and Gorsuch

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to be those that involve either especially significant subjects of government decision making or especially sensitive political matters, or both. As such, they are also most likely to attract the attention of high-level officials in the executive bureaucracy, who may more readily perceive the executive branch's stake in the nondisclosure of information. If this hypothesis is correct, it is irrelevant to the handling of such disputes that thousands of other information demands—demands for nonsensitive information that are handled by low-level or medium-level bureaucrats—are amicably resolved.

190. See, e.g., sources cited *supra* note 146.

191. See *supra* text accompanying notes 21-84.



disputes, these different conceptions only exacerbated the branches' antagonism. The following section elaborates a strategy for achieving accommodation more efficiently notwithstanding the branches' deep-seated legal disagreement.

## B. THE STRATEGY OF PROBLEM-SOLVING NEGOTIATION

In the last five years, legal scholars have turned great attention to a strategy of dispute resolution that seems ideally suited to negotiating executive privilege disputes, especially in light of the branches' different legal understandings and the virtues of according them individual respect.<sup>192</sup> This strategy has been variously labeled, but is perhaps easiest to understand as "problem-solving negotiation."<sup>193</sup> The pioneer work popularizing this kind of approach to dispute resolution was *Getting to YES: Negotiating Agreement Without Giving In*, coauthored by Roger Fisher and William Ury.<sup>194</sup> Whether one utilizes their version or some other, the key to the approach is making the parties aware of each others' underlying needs and objectives and attempting solutions that meet a great number of those needs through expanding the resources available to the parties for a resolution of the dispute. These aims stand in contrast to what Fisher and Ury decry as "positional bargaining," in which "[e]ach side takes a position, argues for it, and makes concessions to reach a compromise."<sup>195</sup>

In essence, this Article argues that problem-solving negotiation provides a critical opportunity for the political branches to divorce their processes of legal argumentation from the

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192. See *supra* notes 101-16 and accompanying text.

193. Menkel-Meadow, *supra* note 10, at 758. For a helpful general review of recent literature, see Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 1983 AM. B. FOUND. RES. J. 905.

194. R. FISHER & W. URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981). The Fisher and Ury text is sometimes criticized as superficial or unsophisticated. To some extent, such criticisms may be unfair because the work is largely prescriptive. The book does not undertake a sophisticated modeling of many currently existing negotiations examples because that is not its task. The prescriptive emphasis of Fisher and Ury, moreover, makes it a helpful tool for organizing the discussion that follows. Its ideas are readily accessible and may be presented without a degree of preliminary elaboration that might distract the reader from the specific points this Article offers on executive privilege negotiations. The discussion in this section, therefore, borrows significantly from the Fisher and Ury framework, while drawing insight as well from other works—most notably, D. LAX & J. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* (1986).

195. R. FISHER & W. URY, *supra* note 194, at 3.

processes of interbranch dispute resolution. The intrabran­ch interpretation of law, to the extent it depends on self-interest at all, should depend largely on long-term institutional interests and on the demands of internal management—and thus, on what will typically appear to each branch to be matters of principle. The respective political branches' long-term interest in dispute resolution between themselves, however, is chiefly in preventing immediate disputes from rendering government administration unworkable. It is therefore in the government's long-term interest to focus dispute resolution processes on achieving wise and efficient conclusions to short-term problems, not on the vindication of legal positions. That is precisely what problem solving should help accomplish.

According to Fisher and Ury, the success of problem-solving negotiation depends on four imperatives: separating the people negotiating and their relationship from the problem to be solved; focusing on the parties' "interests," not their "positions"; inventing options for mutual gain; and using "objective" criteria for choosing among options.<sup>196</sup> They recognize that, because of various circumstances, these guidelines will not always suffice for amicable agreement. They insist, however, that some problems typically thought to call for intransigence—for example, one party's dirty tricks or initial refusal to bargain—can often be overcome through a problem-solving approach.<sup>197</sup>

It is heartening to note that the most pressing objections that commentators have urged against the Fisher and Ury approach<sup>198</sup> seem, whatever their general merits, to be of less than critical importance in the executive privilege context. First, it has been suggested that the problem-solving approach overlooks those aspects of bargaining that are purely distributive—that is, for which one party's gain is necessarily the other party's loss.<sup>199</sup> In such a situation, there is by definition no possibility of inventing an option for mutual gain.

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196. *Id.* at 11-12 *passim*. "Separating people from the problem," of course, may be useful to any negotiation, whether integrative or distributive. Further, as discussed below, the recourse to "objective" criteria is not a way of creating new value for the negotiators, but a recommendation for handling the inevitable distributive aspect of the negotiation in a way that does not undermine its problem-solving aspects.

197. *Id.* at 112-49. On helpful strategies to induce another negotiator to undertake problem solving, see Pruitt, *Strategic Choice in Negotiation*, 27 AM. BEHAVIORAL SCIENTIST 167, 187-91 (1983).

198. See, e.g., White, *The Pros and Cons of "Getting to YES,"* 34 J. LEGAL EDUC. 115 (1984) (reviewing Fisher and Ury text).

199. *E.g., id.* at 116.

Although real-life negotiations almost inevitably involve distributive problems, the Fisher-Ury prescriptions nonetheless provide a useful antidote to the tendency to exaggerate any dispute's zero-sum<sup>200</sup> dimension. Congress and the Executive, for example, are inclined to portray informational disputes as purely distributional, pitting indivisible demands for disclosure against indivisible demands for nondisclosure. Such thinking is misleading. Just as every real-life negotiation is likely to have its distributive side, most real-life negotiations also pose opportunities for creating some joint value and some mutual gain.<sup>201</sup> There are, for example, a variety of "goods" at stake in executive privilege disputes: information content, conditions for the handling of information, timing, and the viability of the branches' working relationship in general. Expanding the parties' understanding of the range of interests at stake should profoundly increase the likelihood of a non-zero-sum solution to their immediate contest.

A second objection may be that Fisher and Ury's emphasis on "reason" as an alternative to posturing in the selection among options for dispute resolution<sup>202</sup> is naive. Professor James J. White has written that often resort to "objective criteria" for dispute resolution "will do no more than give the superficial appearance of reasonableness and honesty to one party's position."<sup>203</sup>

This observation, however, overlooks three points. First, giving a superficial appearance of reasonableness and honesty to both parties' positions at the "pie-cutting" stage of negotiations may be most effective at preserving the atmosphere of trust and genuine information sharing that are necessary elements during the "pie-enlarging" stage. Even if the endgame of any negotiation involves a final, zero-sum tradeoff, it is in the parties' interests to preserve an atmosphere up to that point that ensures that the final pool of resources is as large as possible. Second, arguing from principle may itself enlarge the pie to be divided because "[a]cting in accord with . . . a norm or principle may be of intrinsic interest to one or more of the par-

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200. "Zero-sum" and "distributive" are used to denote bargaining situations where any party's realization of value implies the loss of value for another party. "Non-zero-sum" and "integrative" are used to denote bargaining situations where the possibility exists of realizing results that leave all parties better off.

201. D. LAX & J. SEBENIUS, *supra* note 194, at 145.

202. R. FISHER & W. URY, *supra* note 194, at 85-88.

203. White, *supra* note 198, at 117.

ties.”<sup>204</sup> Such “an acknowledged norm need not be an absolute value in a negotiation”; it would be sufficient to help serve to expand the resources for settlement if an acknowledged norm existed to “be partly or fully traded off against other interests.”<sup>205</sup>

Finally, in the executive privilege context, history provides some antidote to rationalization. The genuineness of either branch’s appeal to objective criteria may be measured, in part, by the role that those criteria have played in that branch’s elaboration of executive privilege doctrine in the past.

This last point is an additional and especially important reason why it may actually prove helpful to negotiation if each branch is encouraged as a general matter to work out its own executive privilege doctrine independently. Each branch’s doctrine would then be a source of insight, when disputes arise, as to what that branch considers its truly significant institutional interests. Professor White’s indictment of the appeal to reason applies forcefully to the legal opinions in the Watt and Gorsuch disputes precisely because the parties, however conscientious they tried to be, had not articulated their views in a manner that could disinterestedly be touted as law, but instead seemed to regard the disputes as opportunities to articulate legal argument for strategic advantage.

A third objection to problem-solving negotiation is that, for negotiations conducted in a legal environment, it is simply not possible to separate a discussion of the parties’ needs—what Fisher and Ury consider the proper object of discussion—from a discussion of each party’s arguments as to legal entitlement, that is, their “positions.” This is precisely because the parties are likely to perceive that a vindication of their legal claims is a cognizable need.<sup>206</sup> Such an objection is obviously apposite in a negotiation between private parties, each of which has a legal position that can be vindicated only by the other’s acquiescence or by third-party imprimatur. It seems less apposite, however, to negotiations between Congress and the President. As long as the two political branches can reach resolutions of immediate disputes, there should be no psychological or institutional obstacle to their “agreeing to disagree” about the law. Again, their claims that they are asserting the law correctly can be psychologically vindicated through the application of each

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204. D. LAX & J. SEBENIUS, *supra* note 194, at 73.

205. *Id.*

206. Menkel-Meadow, *supra* note 10, at 827 n.283.

branch's doctrine to its own internal management. There is no practical need for either branch to acquiesce in the other's legal interpretation or to insist on judicial approval for its own.

The final obvious objection to the Fisher and Ury presentation of problem solving is its idealism—the world, it might be said, does not work reasonably. Such an objection, however, attacks problem solving only as a descriptive model, not as prescriptive theory.<sup>207</sup> Whether the disputants in the Watt and Gorsuch matters were successful problem solvers is, indeed, doubtful. The issue for the future is whether sufficient incentives exist to adopt a more promising approach to interbranch negotiations along problem-solving lines. This issue will be taken up in Section D of this Part, after a discussion of how a problem-solving approach might be implemented and what difference such an approach might have made to past disputes.

### C. IMPLEMENTING THE STRATEGY

#### 1. Identifying the Branches' Interests

According to Fisher and Ury, "[t]he basic problem in a negotiation lies not in conflicting positions, but in the conflict between each side's needs, desires, concerns, and fears."<sup>208</sup> Thus, "[f]or a wise solution," they advise, "reconcile interests, not positions."<sup>209</sup> Such a strategy should work for two reasons: first, for every interest a variety of positions (not merely the first asserted by a party) usually exists that could satisfy that interest; second, parties typically have more nonconflicting interests than their positions disclose.<sup>210</sup>

In large measure, this prescription, without elaboration, appears oversimple. As noted above, every real-life negotiation has a zero-sum aspect. Even if the parties identify the range of possible solutions that would maximize their joint interests, they must then choose among those options, and each option will have different implications for the relative distribution of joint value between the parties.<sup>211</sup> Moreover, the process of planning any negotiation is inevitably complicated because the tactics that produce greatest success in the value-creating as-

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207. On the different perspectives from which it is possible to investigate and describe negotiations, see H. RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 20-25 (1982).

208. R. FISHER & W. URY, *supra* note 194, at 42.

209. *Id.* at 41.

210. *Id.* at 43.

211. D. LAX & J. SEBENIUS, *supra* note 194, at 156.

pects of negotiation are in tension with those tactics most productive during zero-sum bargaining.<sup>212</sup> The former benefits from information sharing, honesty and cooperation; the latter is furthered by information concealment, disingenuousness and other strategizing.<sup>213</sup>

Nonetheless, it is critical not to overlook the prospects that almost always exist for creating joint value between the parties to a negotiation and insuring that the pie ultimately divided represents as much joint gain as possible. An interest-based approach to executive privilege negotiations seems an especially promising suggestion because, although the negotiations are often conducted through positional bargaining, many of the branches' interests are obvious and well-known and can be used to maximize the parties' joint gains. In general, Congress is likely to be seeking information for any of three basic reasons: (1) to facilitate its regular managerial oversight, that is, its ongoing supervision of the execution of the laws; (2) to facilitate specific legislative deliberations, aimed at the possible adoption of particular legislative proposals, the possible approval of a treaty, or the like; or (3) to facilitate investigations of particular allegations of executive branch malfeasance, for example, in aid of Congress's impeachment power. The Watt case involved the first and second of these three motivations; the EPA dispute involved the first and third.

To these interests may be added a congressional interest in maintaining a general atmosphere of executive cooperation with Congress. This interest is presumably present at all times, but is balanced by closely related interests in maintaining an atmosphere of mutual respect and in enabling the President to perform his job effectively.

Of course, other interests may play a role in individual disputes. For example, if an agency is politically unpopular, an executive privilege dispute may vindicate what some members of Congress or their staffs perceive as an interest in weakening the political position of the responsible administrator. This sort of interest may be reducible, of course, to the three general interests listed above, or it may have a more partisan or personal aspect. If the congressional antagonists think it in their interest to harass or discredit a cabinet member on partisan grounds, amicable negotiations may be impossible. If partisan goals are

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212. *Id.* at 34-35.

213. *Id.* at 34-35, 154.

not the dominant interests, however, it is likely that Congress's needs will relate to the general categories stated above.

The executive branch's interests in controlling information will be more varied (whether or not weightier). The executive branch has a strong general interest in maintaining its decisional independence that is balanced by its needs to maintain congressional support and enable Congress to act effectively in its designated tasks. Its less overarching interests are exemplified by various grounds specified in the Freedom of Information Act<sup>214</sup> for exemptions from the ordinary rule of mandatory disclosure of executive branch records:

1. Protecting national defense and foreign policy secrets;
2. Protecting trade secrets or confidential financial information;
3. Protecting the candor of intrabranh policy deliberations;
4. Preventing unwarranted invasions of personal privacy, whether of government officers, employees or private persons; or
5. Protecting the integrity of law enforcement investigations and proceedings.<sup>215</sup>

As with Congress, the executive branch, in a particular dispute, may seek to vindicate a more idiosyncratic interest, such as demonstrating presidential "backbone" to an unduly officious congressional staff. Such an interest, if reducible to one of the foregoing interests, need not present an intractable problem. If, however, the executive branch wants chiefly to discredit a particular legislator with that member's constituents, good faith negotiations will obviously be more difficult.

The identification of interests, of course, is only part of successful problem solving. The task remains to motivate the negotiators to talk about their interests (legislative oversight versus presidential privacy, for example), rather than about their positions (divulge versus withhold). Such motivation seems plausible for the political branches because, in general, the prospects for cooperative negotiation are enhanced when the parties involved are repeatedly engaged in dealing with one another. Indeed, parties who know in advance of the likelihood of repeated dealings can explicitly set rules for negotiation in advance.<sup>216</sup>

Executive privilege disputes thus provide a likely context in which the parties would be helped by a formal codification of each side's general interests, as well as a formal commitment to

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214. 5 U.S.C. § 552(b) (1982).

215. *Id.*

216. R. AXELROD, *THE EVOLUTION OF COOPERATION* 12-16, 130-31 (1984); D. LAX & J. SEBENIUS, *supra* note 194, at 165.

invoke those interests in highly specific terms should particular disputes arise. This should not be difficult in theory and does not require statutory enactment. Congress may state its interests in the form of a concurrent resolution, amendable at Congress's complete discretion.<sup>217</sup> The President may state the executive branch's interests in an executive order, likewise amendable. If each branch stated its "case" for disclosure or nondisclosure early and specifically in these agreed-upon terms, both sides' "positions" might prove more responsible and the terms of their discussion more productive. Further, the existence prior to any discussion of general statements of the branches' interests might assist in the recognition of common ground between the branches, which itself would increase the prospects for successful problem solving.<sup>218</sup>

## 2. Inventing Options for Mutual Gain

The next step in problem solving, once interests are well analyzed, is to reconcile those interests. The strategy that Fisher and Ury advance is to "[i]nvent options for mutual gain."<sup>219</sup> This involves searching for shared interests that can be maximized, as well as differing interests that can be dovetailed, rather than focusing on conflicting interests. Such an enterprise, also known as "integrative" bargaining,<sup>220</sup> both narrows the truly difficult area of dispute and creates an atmosphere where constructive bargaining over the hardest problems is most likely to occur.

Both shared and conflicting interests will likely abound in executive privilege disputes. Congress and the President have mutual interests in appearing responsible and cooperative in pursuit of the public interest. Both branches presumably have interests in the success of a government initiative that Congress has authorized and the President is implementing. In some cases, Congress may perceive a need to obtain information quickly for oversight purposes, while the executive branch interest is chiefly in preventing congressional disclosure of particular information to the public. In such an instance, it should be

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217. *Concurrent resolutions* are votes by both houses of Congress, which are not presented to the President for approval and are not intended to have the force and effect of law. They are distinct from *joint resolutions*, which are presented to the President and are functionally identical to bills.

218. Cf. Pruitt, *supra* note 197, at 179 ("Problem solving seems more feasible the greater the perceived common ground . . . is." (emphasis omitted)).

219. R. FISHER & W. URY, *supra* note 194, at 58-83.

220. H. RAIFFA, *supra* note 207, at 131.



possible to dovetail Congress's interest in effective oversight (and full disclosure to Congress) with the executive's interest in information control (and ultimate custody of the information).

The logistical problem, of course, is how to get the branches to focus during the course of a dispute on options for mutual gain. Fisher and Ury provide a host of suggestions for avoiding four common obstacles to integrative bargaining. These obstacles are: premature judgment; thinking there is but one "right answer" to be found; assuming erroneously the existence of a zero-sum game; and having either side regard the other side's problems as "just their problems, not ours."<sup>221</sup>

In the executive privilege context, however, the one suggestion that may prove most constructive is recourse to precedent<sup>222</sup> and, again, the possible documentation of precedent. By this, I do not mean to suggest the normative invocation of precedent that is characteristic of adjudication and of many negotiations—that is, the use of precedent to establish one party's entitlement to favorable treatment equivalent to the treatment enjoyed by other parties in substantially similar circumstances. I mean instead that data on previous negotiations can be useful to current brainstorming by providing reminders that the branches' interests can be dovetailed and by illustrating at least some of the possibilities for doing so.

In various disputes, for example, the two branches have ultimately reconciled their interests in the following ways:

1. Executive acquiescence in Congress's demands;
2. Executive acquiescence in Congress's demands, but in timed stages;
3. Executive release of all information, but under protective conditions, ranging from promises of continued confidentiality to congressional inspection of the material while it remains in executive custody;
4. Executive release of all information, but with limited expurgation or "redaction";<sup>223</sup>
5. Executive release of information in summary form, but with selected sampling to satisfy Congress of accurate summation;
6. Executive release of summary information only; or
7. Congressional acquiescence in executive nondisclosure.

The existence of such a variety of techniques for control-

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221. R. FISHER & W. URY, *supra* note 194, at 59.

222. *Id.* at 81-82.

223. "Redaction" is a term commonly used in government to refer to the expurgation from a document of all information that might identify the individuals who prepared or are discussed in the document.

ling the timing, content, and conditions of disclosure should be highlighted in any interbranch *modus vivendi* on executive privilege. The branches could commit themselves to explain, in negotiation, not only their specific interests, but how those interests would be advanced or compromised by each of these strategies and others that may arise through "brainstorming." Comparing and contrasting the two branches' specific responses to a variety of strategies might profitably and quickly reduce their area of disagreement.

### 3. Separating People from the Problem

The first suggestion Fisher and Ury proffer in the elaboration of their prescribed negotiations method is to "[s]eparate the people from the problem."<sup>224</sup> They point out: "Most negotiations take place in the context of an ongoing relationship where it is important to carry on each negotiation in a way that will help rather than hinder future relations and future negotiations."<sup>225</sup> For this reason, Fisher and Ury strongly advise avoiding an entanglement of the parties' relationship in the dispute over substance. To this end, they argue against making the quality of the relationship depend on the outcome of the substantive negotiation. The parties to a dispute are urged, instead, to "[b]ase the relationship on accurate perceptions, clear communication, appropriate emotions, and a forward-looking, purposive outlook," independent of substance.<sup>226</sup>

In applying this advice to the executive privilege context, there is an important distinction to note between the institutional relationship between the political branches and the personal relationships among the persons acting on each branch's behalf. The institutional relationship is part of the substance of executive privilege disputes, and it is therefore impossible to separate the substance of the disputes from that relationship. The advice is pointedly apt, however, with respect to the personal relationships among the individuals negotiating. People who have been involved in interbranch negotiation would surely testify that the potential for ill will and inefficiency is everpresent where committee staff and agency staff permit ego to overtake substance.

To make that point, however, is to highlight the difficulty in finding a structural solution to this particular problem.

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224. R. FISHER & W. URY, *supra* note 194, at 11; *see also id.* at 17-40.

225. *Id.* at 20.

226. *Id.* at 21-22.

Fisher and Ury proffer a host of suggestions to help "separate the people from the problem," but all are behavioral suggestions directed at what might be called the "micro" level of negotiation, that is, the actual face-to-face encounter of bargainers.<sup>227</sup> Thus, their implementation would seem to depend largely on the personalities of the individuals engaged in bargaining. If a staff person is someone who might politely be called an egomaniac, it is doubtful that negotiations will benefit much from an executive order requiring agency representatives, say, to "[m]ake emotions explicit and acknowledge them as legitimate."<sup>228</sup>

Moreover, structural interbranch problems exacerbate the human tendency—distressingly evident in the halls of power—to place ego first. In particular, although the political branches have an ongoing relationship to which negotiators should be attentive, responsibility for negotiating executive privilege disputes is widely diffused on Congress's side. Fortuity alone determines the degree of sensitivity to the interbranch relationship that has been internalized by the particular member or the member's staff responsible for negotiation.

In contrast, executive privilege negotiations on the executive side are focused predominantly in the White House and in the Office of Legal Counsel of the United States Department of Justice. Other problems aside, the involvement in these disputes of a few key actors who are routinely exposed to the full breadth of issues on which Congress and the executive are interdependent should provide a strong likelihood that executive branch negotiators will have both internalized psychologically the importance of the interbranch relationship and learned the importance of subordinating their personal emotional needs to the dictates of a sound interbranch relationship.<sup>229</sup>

If Congress could likewise centralize responsibility for executive privilege negotiations, at least once negotiations pass the most informal level, the routine involvement on both sides of a predictable group of actors would greatly assist in separating people from the substantive problems presented.<sup>230</sup> The

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227. *Id.* at 21-40.

228. *Id.* at 31.

229. *Cf.* D. LAX & J. SEBENIUS, *supra* note 194, at 166 (stressing the significance, in fostering integrative bargaining styles, of socializing new organizational recruits into cooperative norms).

230. Frequency of interaction is a centrally important condition for promoting cooperation in the kind of negotiating context that Congress and the executive branch face. Establishing hierarchy and organization especially

likeliest repositories for such responsibilities are the offices of the Speaker and Senate Majority Leader or the offices of the chairs of the respective Committees on the Judiciary. The former are preferable because, like the President (and his Attorney General), the Speaker and Majority Leader (and their staffs) should be most deeply aware of the full range of issues under consideration by the two branches and of the importance of an overall pattern of cooperation. The latter, however, have the possible advantage of deeper immersion in the relevant legal issues and the greatest day-to-day interaction with the Department of Justice on other problems.<sup>231</sup>

Centralizing negotiating responsibility in some particular office in each house of Congress would greatly reduce whatever distortion is worked in negotiations by the limelight-seeking tendencies or personal idiosyncrasies of the member or staff person who happens, on a given day, to become involved in an information dispute. Unfortunately, this kind of centralization

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helps to increase contacts between individual bargainers. R. AXELROD, *supra* note 216, at 12-16, 130-31 (1984).

Professor Axelrod has designed a number of fascinating experiments that suggest reasons why repeat interactions facilitate cooperative bargaining. In effect, he set up a game situation in which two negotiators clearly face the Prisoner's Dilemma—that is, noncooperative behavior is each bargainer's only possible route to maximizing personal gain and avoiding maximum personal loss, but only mutually cooperative behavior can maximize the joint gain. He then invited game theorists to submit strategies embodied in computer programs for playing the game. No matter how sophisticated the strategies became, the most successful strategy was simple: offer cooperation first; cooperate repeatedly so long as the other party cooperates; on every occasion when the other party fails to cooperate, retaliate; as soon as the other party returns to cooperation, forgive its noncooperation by returning to cooperation also. See D. LAX & J. SEBENIUS, *supra* note 194, at 158-60.

Although such experiments can be only suggestive because they operate in an artificially limited environment, their implications are intriguing. They suggest that joint gains are maximized when the parties play by simple, mutually understood rules that underscore a willingness to cooperate plus a determination to retaliate against noncooperation. Repeat negotiations among the same parties would likely maximize the prospects for reaching such an understanding.

231. It may seem quixotic to hope members of Congress would ever delegate significant authority to one committee to affect the operations of another. Intercommittee cooperation, however, is not unknown. Indeed, the still ongoing imbroglio over EPA records involves an investigation conducted by the House Judiciary Committee of the executive branch's conduct vis-à-vis the House Committees on Public Works and Transportation and on Energy and Commerce. See generally H.R. REP. NO. 435, 99th Cong., 1st Sess. (1985) (four volumes). The Judiciary Committee investigation, which alleges significant executive branch misconduct, occurred at the apparent behest of the other committees. 1 *id.* at 5.

runs directly against Congress's recent centrifugal tendencies<sup>232</sup> and, as discussed below, is likely to meet resistance.<sup>233</sup>

#### 4. Invoking Objective Criteria for Dispute Resolution

The final aspect of the Fisher and Ury approach involves the "distributional" aspect of bargaining, that is, where one party's gain will be the other party's concession. As noted earlier, Fisher and Ury recommend using objective criteria rather than a test of wills. They argue that "[a] constant battle for dominance threatens a relationship."<sup>234</sup> It is, therefore, "far easier to deal with people when both . . . are discussing objective standards for settling a problem instead of trying to force each other to back down."<sup>235</sup> As noted earlier,<sup>236</sup> this suggestion does not pertain chiefly to the problem-solving aspect of a negotiation. Its aim is to constrain the parties' conduct of the distributive aspect of the negotiation in a way that does not undermine the prospects for problem solving.

As Panglossian as this may sound to the cynical, it should be easier for government institutions to approach disputes in this manner than for many private bargainers to do so. First, the branches would be aware of the incentive for principled discussion, namely, maintaining the best atmosphere for achieving whatever joint gains are possible through negotiation. Further, as noted above,<sup>237</sup> precedent exists as a source of criteria outside the parties' immediate dispute, by which it becomes possible to judge the practicability of possible resolutions to the current dispute.<sup>238</sup> For example, in a dispute over information that the executive branch and Congress agree can acceptably be shared with a congressional committee in executive session, the only issue for resolution is whether all copies of the material will return to the executive branch following disclosure. Discussion could turn to like disclosures in the past. The committee's counsel might then say: "We handled the Smith matter last year in the way we now propose. In what way do the two

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232. See, e.g., Broder, *supra* note 5 (citing the common criticism that "Congress has become bogged down in the intricacies of its own process, the diffusion of its own power and the increase of its own workload," *id.* at 9, col. 4).

233. See *infra* text accompanying notes 267-68.

234. R. FISHER & W. URY, *supra* note 194, at 86.

235. *Id.*

236. See *supra* notes 199-205 and accompanying text.

237. See *supra* text accompanying note 222.

238. The recognition of relevant features from prior interactions is necessary for sustaining cooperation between recurrent bargainers. R. AXELROD, *supra* note 216, at 139.

cases differ? Is this information more sensitive? Did anything subsequent to your disclosure of information last year belie the wisdom of that settlement?"

In further illustration, if Congress agrees with the executive branch that it needs only summary versions of the demanded information at the present time, the dispute concerns only the extent to which Congress may compare representative summaries with the underlying documents to ensure authenticity. The Assistant Attorney General in charge of the Office of Legal Counsel might then say: "For the Jones investigation, we allowed you to check one of every 20 summaries. Is the information we are now providing any less likely to be accurate than the Jones files? Has anything occurred to suggest the insufficiency of the sampling in Jones for your purposes?"

These examples demonstrate that the use of past executive privilege dispute resolutions as benchmarks for current reasoning can foster discussion about reasons for disclosure or nondisclosure, rather than simply assertions about what each side is entitled or willing to do.

## 5. The Prospects for Third-Party Intervention

This Article has used the Fisher and Ury model to sketch a possible approach to executive privilege decisions based on problem solving. The issue remains whether this approach, even if implemented, would successfully conserve the branches' time and effort. The problem remains that negotiations might bog down if the prospect of ultimate resort to the courts pushes the branches to view their positions as preludes to litigation, rather than as attempts to solve immediate problems reasonably. Relatedly, one or the other branch might simply view delay as a sufficient interest to warrant prolonging the dispute for the sake of delay alone.<sup>239</sup>

To avoid these problems, among others, the political branches might consider the option of inviting third-party intervention. Facilitating this suggestion is the one aspect of the

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239. Both the Watt and Gorsuch disputes were primarily disputes over the timing of disclosure. Recall that Secretary Watt voluntarily released most of the contested documents once his decision on Canada's status under the Mineral Lands Leasing Act had been made. *See supra* notes 137-38 and accompanying text. Similarly, the executive branch position sought to protect the EPA documents because of their relevance to ongoing law enforcement investigations. *See supra* notes 166-71 and accompanying text. Implicitly, the conclusion of those investigations would likewise have permitted the release of many of the EPA documents, even under the executive branch's view of privilege.

plan advanced here that requires statutory enactment. Legislation might authorize individual members of the United States Court of Appeals for the District of Columbia Circuit or of the United States District Court for the District of Columbia, chosen at random as the need arises, to act as nonbinding mediators of executive privilege disputes.<sup>240</sup> Although policy reasons exist for opposing the use of judges for such nonadjudicative business,<sup>241</sup> it seems plain that no mediator who lacks the status of coequal authority with the bargaining branches could play a mediating role effectively. The participation of such a mediator might facilitate dispute resolution in a variety of familiar ways: by assisting the parties in their analysis of interests and of precedent, by providing an avenue for the parties to express their genuine interests or positions at low risk, by facilitating the flow of information between the parties, by enhancing the parties' creativity, by reducing their differences

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240. A significant issue arises, of course, whether Congress may assign article III judges nonarticle III tasks. Under the Supreme Court's current functional approach to separation of powers issues, there would be no absolute bar to such assignments; they could be imposed, however, only in a way that would not interfere with the constitutionally required duties of the article III courts. Compare *In re President's Comm'n on Organized Crime*, 763 F.2d 1191, 1197 (11th Cir. 1985) (holding that, under the functional standard, the imposition of investigative powers on the President's Commission on Organized Crime renders unconstitutional the inclusion of article III judges among its members) with *In re President's Comm'n on Organized Crime Subpoena of Nicodemo Scarfo*, 783 F.2d 370, 380-81 (3d Cir. 1986) (holding that the presence of article III judges on the President's Commission on Organized Crime does not interfere with the judges' article III obligations and is therefore not unconstitutional); cf. *Hobson v. Hansen*, 265 F. Supp. 902, 919 (D.D.C. 1967) (upholding a District of Columbia statute requiring district court judges for the District of Columbia to appoint members of the Board of Education). Such conflicts might well be avoided through the disqualification of mediator-judges in any subsequent cases before the D.C. Court of Appeals that involve the issues they mediated.

241. For example, in a situation such as the present where different political parties control the house of Congress that would be demanding information and the White House, any judge selected to play a mediator's role necessarily would be an appointee from one or the other major political party. This could significantly undermine the branches' willingness to view judges as suitable mediators. Letter from Martin F. Richman to Peter M. Shane (Oct. 20, 1986) (discussing earlier draft of this Article). Additionally, although providing for the mediator's recusal in any subsequent judicial proceeding concerning a particular dispute avoids the immediate conflict-of-roles problem, the parties may perceive that other judges may be so little disposed to second-guess any compromise that they know their mediator-colleague suggested as to eliminate the utility of later judicial review. Letter from Peter L. Strauss to Peter M. Shane (Oct. 16, 1986) (discussing earlier draft of this Article). This latter problem might be partially addressed by keeping the mediator's recommendations out of the record of any subsequent judicial proceeding.

through the deflation of unrealistic expectations or by suggesting avenues of agreement, or by blunting the escalation of conflict and lending further seriousness of purpose to the atmosphere of negotiations because of the judge's own prestige.<sup>242</sup>

The most critical functions a mediator may perform, however, are giving the parties the benefit of outside advice without binding litigation and helping to avoid fruitless protraction of negotiations that have reached an impasse. The latter may be accomplished by vesting in the mediator the power to declare such impasse (leaving Congress, if it wishes, to press its subpoena), which would encompass the power to impose strict deadlines for the course of negotiation. This power could have enormous impact in preventing the unproductive expenditure of time and human resources over an intractable disagreement.<sup>243</sup>

## 6. Would Problem Solving Make a Difference?

Postponing for the moment the obvious question whether the approach thus outlined would ever be implemented by Con-

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242. See H. RAIFFA, *supra* note 207, at 218-34.

243. Professor Bruff has suggested an alternative strategy for prompting negotiations—namely, authorizing any congressional committee dissatisfied with the executive to seek authorization from its chamber to pursue a declaratory judgment suit to determine the dispute. The judge in any such case would be empowered to play a binding mediator's role analogous to the role played by the panel in *United States v. AT&T*, 567 F.2d 121 (D.C. Cir. 1977), compelling whatever measures are necessary to facilitate the best interbranch compromise. Letter from Harold H. Bruff to Peter L. Strauss (Sept. 24, 1986) (discussing earlier draft of this Article).

Professor Bruff's suggestion is an appealing one in two respects. First, whenever the procedure is invoked, the judge, as a mediator with powers of compulsion, might be situated as a resource either side could invoke to retaliate against noncooperative bargaining by the opposing branch. Second, at the very least, some such procedure is a manifestly neater way of bringing a dispute to closure than is the contempt process, a disposition which, given the Gorsuch experience, does not seem satisfactory.

Professor Bruff's suggestion is problematic, however, as a remedy for the kind of positional bargaining identified in this Article. The reason for this is, simply, that the declaratory judgment procedure can have its salutary effects only if invoked—and the compulsory powers a judge has in such a suit provide a substantial disincentive for invoking it. Inviting binding arbitration is riskier than inviting nonbinding mediation, and Congress may be reluctant to sue as long as the committee believes it has a good chance of striking a favorable deal informally. The implication of that prediction is that the invocation of the declaratory judgment proceeding would be preceded by exactly the same bargaining that now goes on prior to a contempt citation and, without reform, that bargaining is no more likely to be cooperative.



gress and by the President,<sup>244</sup> a preliminary question arises: what difference would the approach make? Any answer to that question must necessarily be speculative, and, of course, the right answer may vary from dispute to dispute. Hopeful, positive answers are suggested, however, by reflection on the Watt and Gorsuch matters, which likely would have transpired differently in some respects under a problem-solving regime.

There are at least four measures of the quality of a negotiation, and it is necessary here to distinguish among them. A negotiation may be characterized by its substantive outcome, the amount of time it consumes, its immediate impact on the parties' relationship, and its longer term impact on the parties' relationship. As to the first two measures, problem solving would probably have made little difference in the Watt and Gorsuch matters. As to the latter two measures, the impact could have been substantial.

The measure of the Watt and Gorsuch disputes that would likely have varied least with a problem-solving approach is their substantive outcomes. In the Gorsuch matter, the executive branch articulated a weighty and concrete justification for nondisclosure that could not lightly be dismissed. Once probable cause existed, however, to suspect criminal wrongdoing by the Superfund administrator, the executive branch would have been compelled by its own articulated principles to disclose to Congress all information relevant to her management of the Superfund. Thus, the existence of administrative corruption foreordained eventual disclosure of all the information Congress sought, regardless of any reasons that might otherwise have been proffered to justify nondisclosure.

Similarly, in the Watt matter, eventual disclosure of all the information demanded was foreordained once Watt made his statutorily authorized decision and the executive branch interest in protecting the integrity of that decision was mooted. Despite the plausibility of executive claims to privilege for intrabranched deliberative documents and documents relevant to foreign policy making, the matter under investigation fell squarely within Congress's express and exclusive power "[t]o regulate Commerce with foreign Nations."<sup>245</sup> Absent a military or state secrets claim, which was not made, Congress's articu-

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244. This issue is addressed in Section D, *infra* notes 260-68 and accompanying text.

245. U.S. CONST., art. I, § 8, cl. 3.

lated need for the information in question could not persuasively be gainsaid.

Whether time might have been saved in the disputes is also a problematic issue in gauging the success of the branches' negotiation techniques. Seven months elapsed between Watt's initial testimony to Congress indicating an unlikelihood of full disclosure and the Administration's final response and five months elapsed between subpoena and compliance. Although a problem-solving regime might have saved some time, the protection of some of the demanded information until Watt had time to make his statutory decision would have been a likely feature of a compromise solution. If this hypothesis is correct, full disclosure still would have taken a period of months.

The Gorsuch dispute consumed less time. Only five months elapsed between initial demand and full disclosure, and three months between subpoena and compliance. By government standards, this timing is probably not remarkably inefficient. More to the point, the timing of full disclosure in the Gorsuch case was controlled largely by extrinsic events, especially the discovery of proof implicating Rita Lavelle in perjury.<sup>246</sup> Had it been possible to negotiate a solution in less time than that actually taken, that solution might not have entailed full disclosure. On the other hand, once Lavelle's possible offense became known, full disclosure would likely have been irresistible in any event.

One aspect of these negotiations that problem solving could well have improved, however, is their immediate impact on the branches' interrelationship. In the Gorsuch matter, a commitment to problem solving might well have obviated the House vote of contempt and the executive branch's futile and provocative attempt to enjoin enforcement of the congressional subpoena. This hypothesis is based on the likely impact of mediation in sustaining the executive's claim to some nondisclosure, at least during the period prior to Lavelle's incrimination.<sup>247</sup> In the Watt matter, commitment to problem solving might well have averted the patent loss of good will resulting

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246. See *supra* notes 183-86 and accompanying text.

247. The recent Judiciary Committee investigation into the withholding of the EPA documents from Congress concluded that the Department of Justice knew earlier than February 1983, when the executive privilege claim was abandoned, that there were substantial reasons to suspect EPA wrongdoing. See H.R. REP. NO. 435, 99th Cong., 1st Sess. 9-10, 20-22 *passim* (1985). Such knowledge should have ended the privilege claim under the executive branch's own view of executive privilege.

from the parties' posturing and ego involvement. Notwithstanding public testimony by Secretary Watt and Chairman Dingell disavowing any personal animosity,<sup>248</sup> one need not be a literary interpreter as sophisticated as Levi-Strauss to divine in the text of even the public hearings an air of petulance and arrogance on Watt's part and the Committee's conspicuous resentment of it.<sup>249</sup> When the further issue developed whether the Attorney General would testify personally regarding his opinion supporting Watt, relations only grew worse.

Finally, a problem-solving approach might well have obviated those aspects of the negotiations that will likely have long-term impacts on the branches' interrelationship, impacts that at least one branch is bound to find unfortunate. The Justice Department's abortive effort to enjoin the congressional contempt citation in the Gorsuch case resulted in precedent unfavorable to future executive branch attempts to fight contempt citations outside the bounds of a criminal enforcement proceeding. A related circumstance of equal misfortune to the executive branch was the doubt cast on its credibility by the United States Attorney's unwillingness to proceed on a contempt citation as was directed by statute.<sup>250</sup> Should the executive branch ever seek relaxation of the "independent counsel," or special prosecutor, provisions of the Ethics in Government Act,<sup>251</sup> for example, this episode is likely to be heavy ammunition in the direction of greater congressional stringency concerning the regulation of prosecutions of high government officials.

In the Watt case, the deleterious long-term effects emanate from former Attorney General Smith's formal opinion in support of the legality of Watt's nondisclosure. However sincere the writer's (or ghostwriters') views, the opinion appears to be a one-sided brief, uttered in a context where the executive branch case for nondisclosure was weak on the facts.<sup>252</sup> It evidences the kind of immoderation that is threatened by a strategic and adversarial attitude towards legal interpretation. To be

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248. See *Watt Contempt Hearings*, *supra* note 7, at 89; see also *supra* note 145.

249. See, e.g., *Watt Contempt Hearings*, *supra* note 7, at 75, 87-88 (colloquies of Sec. Watt and Rep. Dingell); see also H.R. REP. NO. 898, 97th Cong., 2d Sess. 68-69 (1982) (noting Watt's display of personal arrogance as unprecedented among Cabinet officers).

250. See H.R. REP. NO. 435, 99th Cong., 1st Sess. 19 (1985); see *supra* note 180.

251. 28 U.S.C. §§ 591-598 (1982).

252. See *supra* notes 126-31 and accompanying text.

sure, moderation is not the outstanding characteristic of the congressional statements on the Watt matter either, but the core legal position underlying those statements is better grounded in conventional legal understanding.<sup>253</sup>

As summarized above,<sup>254</sup> the conclusion of the Attorney General's opinion favorable to Watt rested largely on two highly controversial assumptions. The opinion concluded that Congress's general oversight interest in information is a weaker interest than that involved when specific legislative proposals are at issue.<sup>255</sup> The opinion also asserted that Congress's oversight interest will support a demand for predecisional documents "only in the most unusual circumstances."<sup>256</sup> Even within the body of the Attorney General opinions, these premises are not supported and, indeed, the Attorney General cites no support. They are novel and, as discussed below, are not supported by logic or policy.

First, it seems odd to suggest that Congress's need for information is less compelling when it is trying to decide if any action is needed than when it is trying to decide whether particular proposed action is wise. Proceeding from the general contemplation of action to specific proposals would seem to be especially dependent on recourse to helpful information. As the Attorney General himself noted, Congress is far less likely to be able to demand information with precision at the oversight or general-contemplation-of-action stage than at the concrete proposal stage.<sup>257</sup>

Neither is there Supreme Court precedent supporting the Attorney General's position. Congress's oversight and legislative deliberations are both authorized in aid of its specifically enumerated powers in article I, section 8 of the Constitution. A hearing connected with Congress's enumerated power to regulate foreign commerce embodies its constitutional interest in the implementation of that power, whether the hearing is an "oversight" hearing or a deliberation over legislative proposals.

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253. The statement of the General Counsel to the House Clerk on the Gorsuch matter is more open to criticism because of its failure even to address the applicability of executive privilege decisions that would seem to favor the executive branch position. See House General Counsel's Gorsuch Memorandum, *supra* note 61, reprinted in GORSUCH REPORT, *supra* note 61, app. at 58.

254. See *supra* notes 126-31 and accompanying text.

255. Att'y Gen.'s Watt Opinion, *supra* note 7, at 30, reprinted in *Watt Contempt Hearings*, *supra* note 7, at 106.

256. *Id.*, reprinted in *Watt Contempt Hearings*, *supra* note 7, at 107.

257. See *id.*, reprinted in *Watt Contempt Hearings*, *supra* note 7, at 106.

Likewise, the Attorney General's insistence that Congress will have "a legitimate need to know the preliminary positions taken by Executive Branch officials during internal deliberations only in the rarest of circumstances"<sup>258</sup> is defensible only where it refers to information demands that occur while the internal deliberations are ongoing, a point he fails to stress. After decisions are made, Congress would presumably find it *routinely* beneficial to trace the course of deliberations, as well as the decision's results, to evaluate the quality of executive branch decision making. Congress is responsible not only for authorizing most of the administrative discretion that the executive branch enjoys, but also the totality of its funding. Although countervailing considerations may augur for nondisclosure in particular cases, it hardly seems illegitimate as a general matter for Congress to inquire into the process, as well as the results, of decision making.

Even if the Attorney General's argument were better founded, the context in which he rendered his opinion underscores its one-sidedness. As noted, Congress's inquiry was within the core of a specifically vested congressional power. Congress's demand for a military secret, for the background file respecting a presidential pardon, or for other information similarly related to an undoubtedly exclusive presidential authority would surely have presented a better occasion to make "new" constitutional law. It is doubtful whether future Attorneys General will use the Smith opinion as authority. Worse, it is probable that the Smith opinion created a justifiable impression that it was an advocacy document, not a judicious assertion of law.<sup>259</sup>

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258. *Id.* at 31, reprinted in *Watt Contempt Hearings*, *supra* note 7, at 107. Standing alone, the Attorney General's statement is ambiguous. It could be interpreted to mean that, while executive branch policy deliberations are actually going on, Congress will rarely have a legitimate need to know the executive branch's developing preliminary positions. Alternatively, it could mean that, at any time, Congress will rarely have a legitimate interest in reviewing predecisional documents. The former position is a far more defensible view than the latter because, in essence, it disputes only an implicit assertion by members of Congress that they may actually participate in the administration of the laws.

259. For an example of a similar embarrassment, never again cited by the executive branch as authoritative, see the opinion of Attorney General Griffin Bell asserting the constitutionality of the legislative veto provisions of the Reorganization Act of 1949. 43 Op. Att'y Gen. No. 10 (Jan. 31, 1977) (approving statute that provided that a reorganization plan would become effective 60 days after its transmittal to Congress by the President unless *either* House vetoed plan within 60 days). Compare the executive branch's position on the leg-

The one-sidedness of the Attorney General's opinion in the Watt case strongly implied that the executive branch perceived itself engaged in positional, zero-sum bargaining with Congress, not in problem-solving negotiation. Congress may have shared, even engendered, that perception. The executive branch, however, would have been better served had the Attorney General not articulated his stance as if he viewed the dispute as an occasion for an adversarial expostulation of law. A sensible resolution of Watt's short-term dispute with Congress would have been more in the executive branch's short-term and long-term interests.

#### D. IS REFORM POSSIBLE?

It's a familiar quip in Washington that people come to Congress bemoaning how little gets done and leave amazed that anything gets done at all. The serious thought underlying this joke is that Congress is so cumbersome, its processes so complex, and the interests involved so multifarious, that serious reform in any area is difficult to obtain, especially at any time when reform is less than desperately needed. Adding to these perceptions the equally strong forces in favor of executive branch inertia, it may seem wishful thinking to imagine the political branches adopting any of the foregoing proposals, no matter how well considered or promising for the future.

In separation of powers disputes, the political branches may face what the game theorists refer to as the Prisoner's Dilemma.<sup>260</sup> In such a setting, the players can maximize their common utility by cooperating, but three nettlesome conditions exist. Each player must choose a strategy without knowing what the other will do. No matter what the other player does, noncooperation is the only strategy that protects an individual player against the worse possible consequences for that player. Yet, if neither offers to cooperate, both will do worse than if both had cooperated.<sup>261</sup>

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islative veto in *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (holding a one-House veto provision of the Immigration and Nationality Act unconstitutional as bypassing constitutional requirements of presentment and bicameralism).

260. See *supra* note 230; see also R. AXELROD, *supra* note 216, at 7-19.

261. To see why the game is called the Prisoner's Dilemma, consider two criminal suspects, A and B. In separate interrogations, each is told that, if he testifies against the other, he will get a maximum prison sentence of two years. If he refuses to testify against the other, but is implicated by the other prisoner's testimony, he will get a five-year sentence. Both prisoners know

The political branches have a major advantage in promoting cooperation in such an atmosphere in that they interact frequently.<sup>262</sup> Yet, frequent interaction does not guarantee cooperation. In assessing whether cooperation can be achieved along the lines suggested in this Article, it is helpful to focus on two separate questions. First, are there reasons for thinking this proposal might fare better than past suggestions for reform in this area? Second, what, in general, are the incentives or disincentives to adopt these recommended changes?

In reaction to President Nixon's abundant recourse to executive privilege, Congress considered in the early 1970s a variety of bills to regulate at least some aspects of the process of demanding information from the executive branch.<sup>263</sup> One such bill actually passed the Senate.<sup>264</sup> Most such proposals either formalized the requirement for a presidential claim of executive privilege or provided for judicial review should Congress and the President reach an impasse. A thoughtful report of the Committee on Civil Rights of the Association of the Bar of the City of New York, based on a detailed study of the history of and rationale for executive privilege, recommended both steps.<sup>265</sup>

Two good reasons exist to believe that the problem-solving approach outlined above incorporates features that would be more attractive to both branches than these prior recommendations. First, the approach is largely adoptable, as mentioned above, by a complementary congressional resolution and presidential executive order.<sup>266</sup> Such a procedure would formally preserve each branch's claim to plenary authority over executive branch information and permit each branch the formal option of backing out if the *modus vivendi* breaks down. Second,

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that, if each refuses to testify, they will both go free. The dilemma arises because, although *A* and *B* can minimize their jail time if each refuses to testify, testifying is the only way *A* or *B* can guarantee against the five-year sentence that is the worst result for either player.

262. See R. AXELROD, *supra* note 216, at 16.

263. See, e.g., *Executive Privilege—Secrecy in Government: Hearings on S. 2170, S. 2378, and S. 2420 Before the Subcomm. on Intergovernmental Relations of the Senate Government Operations Comm.*, 94th Cong., 1st Sess. (1975) (discussing whether only the President should have the right to withhold information and whether Congress should have the right to subject such a privilege claim to judicial review).

264. S. 2432, 93d Cong., 1st Sess., 119 CONG. REC. 42,101 (1973).

265. Committee on Civil Rights, *Executive Privilege: Analysis and Recommendations for Congressional Legislation*, 29 REC. A.B. CITY N.Y. 177, 201-03 (1974).

266. See *supra* notes 217 & 240 and accompanying text.

it eschews recourse to the courts for dispute resolution. Any such recourse bodes risks for each branch; problem solving offers promise of dispute resolution without litigative risk.

The prospect that this approach may be more attractive than earlier proposals, however, does not itself assure that the incentives for any change will be greater than the disincentives. The unusual interest in any reform during the early 1970s was provoked by a particular series of unusual events. Although the Reagan invocations of executive privilege have been controversial, they have not galvanized anything like the kind of public attention that was focused on Watergate and Nixon's use of executive privilege generally.

To assess the incentives and disincentives to change, it may be helpful to distinguish two sets of forces: the incentives or disincentives with respect to particular proposals, and the incentives or disincentives to do anything at all. If both branches were willing to deal at all with the executive privilege problem, there would seem little disincentive to adopt most features of the outlined proposal. A codification of the kinds of interests supporting disclosure or nondisclosure would be familiar enough. The utility and attractiveness of an interbranch commitment to "invent options for mutual gain" or to refer to objective criteria, especially precedent, for resolving hard issues seem obvious. The chief disincentive for mediation is fear of the unknown; each branch might predict greater success without the use of mediation than with it. Any such prediction would be highly speculative, however, and mediation itself seems to involve very little risk for either branch.

The proposal likely to meet greatest resistance is the proposal for greater centralization of Congress's negotiating "apparatus." Each Congress member's jealousy of his or her own policymaking prerogatives is a powerful disincentive against greater institutional coordination. The situation, however, is not hopeless. On one hand, the increasing entropy of Congress is an oft-noted and much lamented phenomenon.<sup>267</sup> Perhaps the executive privilege area, because it is more exceptional than routine, might appear to Congress to be an attractive area for an experiment with greater institutional discipline and

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267. Representative Morris Udall, a leading early proponent of congressional reform, has said: "We wanted to democratize the place, and we've done that, but maybe we overshot a bit . . . I think about 75 percent of the Democrats have subcommittee chairmanships; but if everybody's in charge, nobody's in charge." Broder, *supra* note 5, at 10, col. 1.



control.<sup>268</sup>

The hardest question of incentives regarding the problem-solving approach, therefore, is whether sufficient reasons exist for the two branches to do anything at all to change their approach to these issues. Resolving all executive privilege issues on an ad hoc basis has an appeal to both branches. The executive branch may fear that a commitment to problem solving would undermine its ability to manage the outflow of information to maximum political advantage. Congress may fear lending any imprimatur, however indirect, to the legitimacy of withholding information from the legislative branch. Now that President Reagan and Congress have interacted for over six years, the patterns of interaction may be too comfortable to suggest to either side a major change.

The time for change will probably be ripest on January 21, 1989, when a new President will take office. Although furor over Nixon's executive privilege policy fueled the last period of major interest in reform, that interest was sure to take on an antiexecutive cast. At a moment when the slate is clean, when each branch is staking out a new relationship with the other, the prospect of formal commitment to problem solving may seem most attractive. A new President, whether Republican or Democrat, could use the proposal as a way of putting the new Administration at a distance from the problems that the Reagan administration had over information. Congress, whatever the majority party, could use the proposal as a way of sounding a constructive note and capitalizing on the good feelings that typically attend a new presidency. Both sides might see this accommodation on a tough structural issue as a good tone-setting device for more substantive problems. It is fair to predict that the country would welcome that change of tone.

In sum, the prospects for reform are not overwhelmingly favorable, but they do exist. Various features of the proposal

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268. There is no blinking the fact that, even if the branches agree to negotiate a modus vivendi on executive privilege, hard substantive issues will be posed for resolution. An obvious example is how to deal with information in the possession of so-called independent administrative agencies. Although it is difficult to distinguish, on the basis of principle or practicality, the President's appropriate relationship to "independent" or "purely executive" agencies, it is the lore of independent agencies that they are more within the ambit of Congress than the latter agencies. For a thorough analysis of this set of problems, see Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984). Professor Strauss specifically addresses the issue of presidential communication with agencies and congressional regulation of such communications. *Id.* at 653-62.

should appeal to both branches, were they to do anything at all. Whether anything at all gets done may depend on timing. The start of a new Administration seems the likeliest moment to try.

### CONCLUSION

Since its inception, the government of the United States has aspired to sometimes conflicting ideals of accountability and efficiency. Justice Brandeis's famous remark that "[t]he doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power"<sup>269</sup> does not tell the whole story. Justice Jackson's observation is at least as important: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government."<sup>270</sup>

Executive privilege disputes with Congress starkly pose the dilemma between accountability and efficiency. Accountability is threatened if the executive branch, pursuing its doctrine of executive privilege, denies Congress information that is important to its oversight and lawmaking functions. Yet, accountability is also threatened when the Executive acts too expediently, sharing information whenever politically convenient and no matter how unwisely. The executive branch is accountable, in other words, both to Congress and to the Constitution.

The question, then, is how to reconcile the demands of accountability and workability in a "government of laws." This Article suggests that, in the enterprise of constitutional interpretation, both Congress and the executive branch should be encouraged to crystallize their respective understandings of the scope of executive privilege into what each branch will regard as controlling legal doctrine within that branch. Taking seriously its responsibilities to formulate defensible executive privilege law should enable each branch to accommodate its particular institutional interests within a legal framework that is justifiable under conventional, legitimate forms of legal reasoning. Following their respective doctrines in pursuing their internal functions should lead the branches to institutional be-

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269. *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

270. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

havior that is consistent and responsible, and should foster official allegiance to the "government of laws" ideal.

In the enterprise of interbranch dispute resolution, the branches should have available to them a problem-solving negotiating strategy aimed at optimizing the pursuit of both branches' institutional interests without regard to their conflicting legal doctrines. They should be able to turn away from the elaboration of long-term doctrine to the solution of short-term problems. When an impasse is so great that no such strategy is workable, that impasse may signal an occasion for the laws of executive privilege to be recrystallized. Then, and only then, should it be necessary for a court to step in and substitute a unitary judicial understanding for the contending positions of the political branches.